1992

State of Utah v. Kelly S. Barnhart : Brief of Appellee

Utah Court of Appeals

Philip L. Foremaster; Attorney for Appellant.
Eric A. Ludlow; Washington County Attorney; Wade A. Farraway; Deputy Washington County Attorney; Attorneys for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	
Plaintiff/Appellee,	)	
vs.	)	Case No. 920357-CA
KELLY S. BARNHART,	)	
Defendant/Appellant.	)	Priority No. 2

BRIEF OF APPELLEE

Appeal from the Fifth Judicial District Court
of Washington County
Honorable James L. Shumate presiding

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BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDING

This Court has jurisdiction to hear the appeal in this matter pursuant to Utah Code Annotated Section 77-18a-1 (1)(a) (1990) and Utah Code Annotated Section 78-2a-3 (2)(f) (1991).

ISSUE PRESENTED FOR REVIEW

Was the Defendant, Kelly S. Barnhart, "in actual physical control of a vehicle" at the time of his arrest, as set forth in Section 41-6-44 of the Utah Code Annotated.

CONSTITUTIONAL AND STATUTORY PROVISIONS CONSIDERED DETERMINATIVE

Utah Code Annotated Section 41-6-44 (1953, as amended).

STATEMENT OF THE CASE

On March 23, 1992, a little before 9:00 p.m., Officer Bill Mathews of the St. George Police Department was dispatched to the parking lot of Lin's Thriftway (a supermarket located at on Bluff Street in St. George, Washington County, Utah) because of a report by Rod Orton (the owner/operator of Lin's Thriftway) of a suspicious vehicle in his parking lot after closing time (Tr. 6).

Upon arriving at the scene, Officer Mathews approached a blue 1983 Buick and saw the Defendant passed out behind the steering wheel on the driver's side of the vehicle. The officer noted that the keys were in the ignition. The Defendant later admitted that the had driven the vehicle to the parking lot.

When the officer, through some effort, was able to waken the Defendant, he noticed that there was a strong order of alcoholic beverage coming from the Defendant, that his speech was slurred and his balance was poor. The officer then had the Defendant perform some field sobriety tests, which the officer felt he failed. At that conclusion of those tests Kelly S. Barnhart was arrested.

At the jail the Defendant was asked to take a breath intoxilizer test, to which he consented. The result of that test was a blood alcohol level of .18 (Tr. 10).

The Defendant admitted that he consumed two cans of beer prior to driving his vehicle to the Thriftway and seven more cans of beer while at the Thriftway (Tr. 5). The Defendant's girl friend arrived at the scene and it was her intention to take the car from the Defendant and drive it thereafter (Tr. 7).

The Court, after hearing the stipulated facts, reading the reports entered into evidence, and hearing the arguments by both parties, found that the Defendant was in actual physical control of the vehicle, that he had a blood alcohol level of .18 as shown by an intoxilizer test, which is above the State of Utah legal blood alcohol limit of .08, that these events occurred in St. George, Utah, and that the Defendant was guilty of being in actual

physical control of a vehicle while under the influence of alcohol pursuant to Section 41-6-44, Utah Code Annotated 1953, as amended (Tr. 20-10).

SUMMARY OF ARGUMENT

The State of Utah argues that the Defendant was in actual physical control of a vehicle while he was under the influence of alcoholic beverages. The basis for this argument is that the Defendant was passed out in the driver's seat, that the keys were in the ignition, that the automobile was operable, and that the Defendant could have started and operated the vehicle at any time. The State also contends that the trial court's finding of the Defendant's guilt was proper and should be upheld.

ARGUMENT

As this Court is already aware, this case comes before the Court of Appeals on stipulated facts, and as this Court ruled in Richfield City v. Walker, 790 P.2d 87 (Utah App. 1990), this Court does not have to defer to the trial court's findings because the trial court's interpretation "becomes a question of law." Id, at 89. However, it is the position of the State of Utah that the trial court made no error in finding that the Defendant had "actual physical control of a vehicle," nor was the resulting guilty verdict in error.

Both this Court in Richfield City and the Utah Supreme Court in Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982) place great weight on public policy and legislative intent. Garcia found that "[a]s a matter of public policy and statutory construction, we believe that the 'actual physical control' language of Utah's

implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants." 645 P.2d at 654. In the instant case, Kelly S. Barnhart drank two beers, got behind the wheel and drove to Lin's Thriftway where he drank seven more beers (which he brought with him) while he sat behind the wheel of the vehicle with the key in the ignition. It is obvious that the intent of the legislature is to thwart situations where persons get behind the wheel and do their drinking there. This is most evident by the enactment of the open container statutes as found in Section 41-6-44.20, Utah Code Annotated (1953, as amended).

In fact, the Garcia court cited Hughes v. State, 535 P.2d 1023 (Okla. Cr., 1975) which stated that "an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to safety and welfare of the public." It was also stated that the danger is less than actual operation of the vehicle but is still a risk. In fact Oklahoma court found that a "defendant when arrested may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away." 535 P.2d at 1024. That same inference can be made here where Barnhart could have, at any time before passing out, reached out and with a flick of his wrist started the motor and become the driver of a motor vehicle with the "propensity to cause harm." State v. Bugger, 483 P.2d 442, 444 (Utah, 1971).

This Court in Richfield cited State v. Smelter, 36 Wash.

App. 439, 674 P.2d 690 (1984) (which quotes State v. Juncewski, 308 N.W.2d 316 (Minn. 1981) as finding that

> [A]ctual physical control statutes have been characterized as "preventive measure[s]" which "deter individuals who have been drinking intoxicating liquor from getting into the vehicles, except as passengers," and which "enable the drunken driver to be apprehended before he strikes."

790 P.2d at 91. In the case before the Court, Barnhart was not a passenger, he was behind the wheel. In fact, he was the only person in the vehicle at the time the officer arrived. This became more obvious in a pre-arrest statement (found in the DUI Form admitted into evidence), where Barnhart, when asked where the owner of the vehicle was, responded by pointing at the passenger seat and saying, "Right there." Of course, no one was there because he was the only person in the vehicle. What is important concerning this statement is that the Defendant felt the owner should be sitting in the passenger seat and not in the driver's seat where he sat.

In regards to public policy, in Richfield City this Court found that "intoxicated motorists should be kept out of their vehicles except as passengers or passive occupants, and should be apprehended before they strike." 790 P.2d at 92. In Barnhart, this public policy was carried out when Officer Mathews took an intoxicated Barnhart from behind the wheel where he sat with the key in the ignition.

The Appellant argues that this Court should let Barnhart go because the law does not apply to him. The Appellee argues otherwise. Appellee does not believe the fact situation of Bugger is analogous with the Barnhart case. In Bugger, the Defendant was

in the back seat of the vehicle and had the car keys with him while he was parked off road. Recent Developments, 79 Utah L.Rev. 191, 193 (1987). Barnhart, on the other hand, was behind the wheel, the keys were in the ignition, and the vehicle was parked in a parking lot from which he could have driven and endangered many innocent persons almost immediately upon turning the key in the ignition.

In Garcia the Utah Supreme Court found "actual physical control" where an individual whose car was blocked between another vehicle and a fence tried to move the vehicle. Even though he could go nowhere, the court found he had control. In Barnhart there was nothing to prevent the Defendant from leaving the scene, which created a more dangerous situation than Garcia because Barnhart was in a position where he could have driven the vehicle and placed the public at large at extreme risk.

In Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986), the Utah Supreme Court found that an individual who was found in a vehicle parked next to a phone booth, asleep, leaning on the vehicle's steering wheel, with the keys in the ignition, and in a vehicle which that defendant claimed would not start to be in "actual physical control" of that vehicle. That court stated that the cases finding "actual physical control" used "the premise that as long as a person is physically able to assert dominion by starting the car and driving away, he has substantially as much control over the vehicle as he would if he were actually driving it," thus relying on Adams v. State, 697 P.2d 622, 625 (Wyo. 1985). In Barnhart, the Defendant had the power to start the car and drive off at any time prior to passing out or upon awakening.

Lopez is similar to Barnhart, except for the fact that in Lopez the car was not working at the time of arrest. In Barnhart the vehicle was operable at the time of arrest and could have been driven at any time, creating a greater risk than that which existed in Lopez.

The case which most closely resembles the fact situation of Barnhart is Richfield City. In that case the defendant went to a Richfield motel seeking a room. No room was available so he returned to his truck in the parking lot to sleep. That defendant was later discovered in his truck by two law officers who found the engine off, the head lights on, the keys in the ignition, and the defendant asleep on the seat with his head towards the passenger door with a blanket over him. The instant case is similar in all respects except for the head lights and the location of the body.

Appellee contends that the lights are not important in that they have no bearing on "actual physical control" and do not show a nexus with facts associated with a DUI. What is important is that the defendant in Richfield City, who was lying on the seat under a blanket, was not as serious a threat to the public as was Barnhart, who passed out sitting upright in the seat behind the wheel. The fact that the defendant in Richfield City was found to be in "actual physical control" by this Court when it was clear that he intended to sleep and not drive is telling because we have no such intent by Barnhart to remain and sleep where he was found parked at a grocery store, sitting upright behind the wheel, with the keys in the ignition and with the opportunity to leave at any time after he awoke.

Richfield City is also important because it creates a "totality of the circumstances" rule in determining "actual physical control." This Court found that:

> Relevant factors for making this determination include, but are not limited to the following: (1) whether defendant was asleep or awake when discovered; (2) the position of the automobile; (3) whether the automobile's motor was running; (4) whether defendant was positioned in the driver's seat of the automobile; (5) whether the defend was the vehicle's sole occupant; (6) whether defendant had possession of the ignition key; (7) defendant's apparent ability to start and move the vehicle; (8) who the car got to where it was found; and (9) whether defendant drove it there.

790 P.2d at 93.

In Barnhart, in reference to item (1), the Defendant was deemed to have passed out behind the wheel by the trial court, which is consistent with those who over-indulge in alcoholic beverages. In reference to item (2), the car was in a parking lot which offered easy access to St. George city streets. Regarding item (3), the motor was not running; however, it only took a turn of the key already in the ignition to change that situation. Item (4) asks whether the defendant was behind the wheel, and the answer to this question is a resounding yes. As to condition (5), the Defendant Barnhart was the only person in the vehicle. Circumstance (6) is also positive, in that the Defendant possessed the key because it was in front of him in the ignition and he had used it to drive himself to the Thriftway. As to item (7), whether the Defendant could start the car and move the vehicle, the answer is yes. Had Barnhart not passed out, he was in a position to start and move the vehicle he was in. In reference to number (8), the car got to Thriftway by the Defendant driving it there. Finally,

the answer to the last point (9) on whether the Defendant drove the vehicle there, the answer is yes.

What this shows is that by looking at the "totality of circumstances," it is clear that Kelly S. Barnhart "was capable of driving off as soon as he awakened." 790 P.2d at 93. Furthermore, he had prior and existing responsibility and control over the vehicle at its present position, the keys were in the ignition, and he could have awakened and driven off, which created "the potential for tragedy." Richfield City, Id. It is quite clear that the "totality of circumstances" show that the Defendant was in "actual physical control" of a vehicle, as was found by the trial court.

CONCLUSION

Appellee contends that the trial court was correct in finding that the Defendant was in "actual physical control" of a vehicle, and asks that the guilty verdict be affirmed.

RESPECTFULLY SUBMITTED this 25th day of November, 1992.

Wade Farraway

WADE FARRAWAY
DEPUTY WASHINGTON COUNTY ATTORNEY

CERTIFICATE OF MAILING

I certify that four true and accurate copies of the foregoing Brief of Appellee were mailed, postage prepaid, to Philip L. Foremaster, 247 Sugar Leo Road, St. George, UT 84770-7944 this 27th day of November, 1992.

Christena Wood

APPENDIX

Copies of Cases Cited

Adams v. State, 697 P.2d 622 (Wyo. 1985)

Garcia v. Schwendiman, 645 P.2d 651 (Utah 1982)

Hughes v. State, 535 P.2d 1023 (Okla. Cr. 1975)

Lopez v. Schwendiman, 720 P.2d 778 (Utah 1986)

Richfield City v. Walker. 790 P.2d 87 (Utah App. 1990)

State v. Bugger, 483 P.2d 442 (Utah 1971)

State v. Smelter, 674 P.2d 690 (Wash. App. 1984)

stricted solely to tort actions. Yet, no conclusive authority is cited for this conclusion. Conversely, Art. 10, § 4, Wyoming Constitution, says "* * * [S]uch fund shall be in lieu of, and shall take the place of *any and all rights of action against any employer* * * *." (Emphasis added.)

The majority imposes liability on the state to indemnify Befus by virtue of a "statutory indemnity contract." This concept sounds like a mutation or hybrid. To my knowledge a "statutory indemnity contract" has no legal basis. I do not feel the legislature in this state created such a concept. Even if there was such a concept, I seriously doubt the legislature ever meant it to apply to a situation such as this. Obviously the holding in this case has doubtful ramifications for future application. Furthermore, the "statutory indemnity contract" invented by the majority cannot be compared to an express or implied indemnity contract as discussed in *Pan American Petroleum Corporation v. Maddux Well Service,* supra.

In his dissent in the Pan American case, Justice Raper disagreed with allowing a third-party claim for indemnity from the employer, stating:

"The majority decision has rendered meaningless the concept of workmen's compensation that '"[i]n adopting the new system both employees and employers gave up something that they each might gain something else, and it was in the nature of a compromise; * * *."' *Stephenson v. Mitchell, ex rel. Workmen's Compensation Department,* Wyo.1977, 569 P.2d 95, quoting from *Zancanelli v. Central Coal & Coke Company,* 1918, 25 Wyo. 511, 173 P. 981. What they got was: '* * * The right of each employee to compensation from such fund *shall be in lieu of and shall take the place of any and all rights of action* against any employer contributing as required by law to such fund *in favor of any person or persons* by reason of any such injuries or death,' § 4, Art. X, Wyoming Constitution.

"But now, through the employment of an artful manipulation of words, misdirection of legal hypotheses and disregard for the clear language of the constitution, the employer does not have the insurance he has paid for. The employee now may indirectly, through use of a third party go-between, obtain an additional recovery from the employer he could not obtain directly. When that is the case, then as observed by the trial judge, 'it appears the constitutional immunity is nearly at an end.'" *Pan American Petroleum Corporation v. Maddux Well Service,* supra, at 1226–1227.

For the reasons stated, I would affirm the district court's disallowance of Befus' claim for indemnification, as well as the Hamlin claims.

Donald Mark ADAMS,
Appellant (Defendant),

v.

The STATE of Wyoming,
Appellee (Plaintiff).

No. 84–173.

Supreme Court of Wyoming.

April 9, 1985.

Defendant was convicted before the Natrona County Court, Stephen E. David-

could murder his employees and be absolutely immune from civil liability. Conversely, the heirs of a murdered employee could only collect worker's compensation. *Parker v. Energy Development Company,* Wyo., 691 P.2d 981 (1984); and *Baker v. Wendy's of Montana, Inc.,* Wyo., 687 P.2d 885 (1984).

Under the circumstances of this case, however, the majority is not so solicitous of the state of Wyoming as an employer paying into the worker's compensation fund. Under the authority of this case a plaintiff (Hamlin) can do indirectly what he could not do directly. He can use a straw man or conduit (Befus) and collect twice from the state.

son, J., of being in actual physical control of his parked vehicle while intoxicated, and he appealed. The District Court of Natrona County, Dan Spangler, J., affirmed, and defendant appealed. The Supreme Court, Brown, J., held that: (1) the element of "actual physical control" contained in statute making it an offense for any person who is under the influence of intoxicating liquor to have actual physical control of any vehicle, was not unconstitutionally vague, and (2) evidence was sufficient to support a finding that defendant was in actual physical control of his vehicle at the time of his arrest.

Affirmed.

1. Automobiles ⇐316

The element of "actual physical control" contained in statute making it an offense for any person who is under the influence of intoxicating liquor to have actual physical control of any vehicle, was not unconstitutionally vague. W.S.1977, § 31-5-233(a).

2. Statutes ⇐188

Words of a statute are to be interpreted in their ordinary, everyday sense unless a contrary interpretation is indicated in the specific statute.

3. Automobiles ⇐332

Where former statute merely made it an offense for anyone to drive while under the influence of intoxicating liquor, new law which makes it an offense to "drive" or "have actual physical control" of any vehicle was intended by the legislature to apply to persons having control of a vehicle while not actually driving it or having it in motion. W.S.1977, § 31-5-233(a).

4. Automobiles ⇐332

Legislative intent in enacting the "actual physical control" portion of statute making it an offense for any person who is under the influence of intoxicating liquor to drive or be in actual control of any vehicle, was apprehending the intoxicated driver before he could do any harm by operating motor vehicle. W.S.1977, § 31-5-233(a).

5. Automobiles ⇐355(6)

Evidence that defendant was found unconscious and intoxicated in driver's seat behind the steering wheel of automobile 20 feet off the highway with the keys in the ignition in the off position, the lights off, and the engine not running was sufficient to support finding that defendant was in actual physical control of his vehicle at the time of his arrest. W.S.1977, § 31-5-233(a).

Donald L. Painter, Casper, for appellant (defendant).

A.G. McClintock, Atty. Gen., Gerald A. Stack, Deputy Atty. Gen., John W. Renneisen, Sr. Asst. Atty. Gen., Terry J. Harris, Asst. Atty. Gen., and Michael A. Blonigen, Asst. Atty. Gen., Cheyenne, for appellee (plaintiff).

Before THOMAS, C.J., and ROSE, ROONEY, BROWN and CARDINE, JJ.

BROWN, Justice.

Appellant was convicted of being in "actual physical control" of his parked vehicle while intoxicated. He raises two issues on appeal:

"I

"Whether the element of 'actual physical control' contained in Section 31-5-233(a), W.S.1977, is unconstitutionally vague?

"II

"Whether there existed sufficient evidence to support a finding that appellant was in 'actual physical control' of his vehicle at the time of his arrest * * *."

We will affirm.

On May 17, 1983, at approximately 11:30 p.m., appellant was found by Highway Patrolman Tom Chatt parked near Highway 220 between Casper and Rawlins, at or near Milepost 75, with his vehicle off the right side of the highway about 20 feet. The engine was not running, none of the

lights were on, and the keys were in the ignition but in the off position. Appellant was unconscious and intoxicated. He was in the driver's seat behind the steering wheel.

When Officer Chatt arrived, appellant did not respond to audible stimuli but did awaken when shaken by the officer. Officer Chatt characterized appellant's conduct and bearing as a "little bit unsteady," but he did not stumble. His speech was either "slightly slurred" or "slightly slow speech." At times appellant appeared confused, but was at all times courteous and cooperative. Appellant stipulated that his blood alcohol reading was .152 shortly after his arrest, and the degree of his intoxication was not an issue at trial, nor is it an issue on appeal.

Appellant was charged with being in "actual physical control" of a motor vehicle while in an intoxicated condition which rendered him incapable of safely operating such vehicle. He was charged with violating § 31-5-233(a), W.S.1977, 1983 Cum. Supp.:

> "It is unlawful for any person who is under the influence of intoxicating liquor, to a degree which renders him incapable of safely driving a motor vehicle, to drive or have actual physical control of any vehicle within this state." [1]

Appellant was tried by the Honorable Stephen E. Davidson, Natrona County Judge, sitting without a jury, and found guilty. His conviction was affirmed by the district court sitting as an intermediate appellate court.

I

[1] Appellant contends that the words "actual physical control," contained in § 31-5-233(a), W.S.1977, are unconstitutionally vague and ambiguous. He did not designate a constitutional issue on appeal, nor was it raised in the courts below. Appellant merely states in his brief that the statute is unconstitutional but he cites no authority. We have not had an occasion to consider the constitutionality of § 31-5-233(a). However, other states have addressed the constitutional challenge that is now before us.

In 1956, Montana had a provision in its statute which utilized the term "actual physical control" in almost the identical manner as involved here. See § 32-2142(1) subd. (a) R.C.M.1947. The Montana Supreme Court held that the statute was "neither vague nor uncertain." *State v. Ruona*, 133 Mont. 243, 321 P.2d 615 (1958). The court stated:

> "* * * Using the term in 'actual physical control' in its composite sense, it means 'existing' or 'present bodily restraint, directing influence, domination or regulation.' Thus, if a person has existing or present bodily restraint, directing influence, domination, or regulation, of an automobile, while under the influence of intoxicating liquor he commits a misdemeanor within the provisions of [the statute]. * * *"

[2] In arriving at the above definition, the Montana court interpreted the words "actual," "physical," and "control" in their ordinary meaning. This is consistent with the general rule that words of a statute are to be interpreted in their ordinary, everyday sense unless a contrary interpretation is indicated in the specific statute. *Wyoming State Department of Education v. Barber*, Wyo., 649 P.2d 681 (1982).

We are satisfied with the Montana Supreme Court's definition of "actual physical control," and are persuaded that such definition is applicable to the Wyoming statute. We hold, therefore, that § 31-5-233(a), W.S.1977, is not unconstitutional because of vagueness or ambiguity. See also *Parker v. State*, Okla.Crim.App., 424 P.2d 997 (1967).

II

[3] Before 1981, § 31-5-233(a), W.S. 1977, made it an offense for anyone, who was under the influence of intoxicating liquor to a degree which rendered him incapable of safely driving a motor vehicle, to

1. Now § 31-5-233(a), W.S.1977 (November 1984 Replacement).

drive any vehicle within the state. The legislature amended the statute in 1981. The word "drive" was retained, and the words "or have actual physical control of" were added in the disjunctive. Ch. 12, S.L. of Wyoming, 1981.

We conclude that the legislature intended that the present law cover factual situations not covered by the earlier statute, and more particularly, that the legislature intended that the law should apply to persons having control of a vehicle while not actually driving it or having it in motion. The new statute defines two different offenses, "driving a vehicle" while intoxicated and "having actual physical control of a vehicle" while intoxicated.

Appellant contends that there was no "actual physical control" under the circumstances of this case, that is, the vehicle lights were off, the engine was not running, the ignition key was in an "off" position, and the vehicle was off the road. Appellant cites the following cases to support his contention. *Key v. Town of Kinsey*, Ala.Crim.App., 424 So.2d 701 (1982); *State v. Zavala*, 136 Ariz. 356, 666 P.2d 456 (1983); *Garcia v. Schwendiman*, Utah, 645 P.2d 651 (1982); *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971).

Other jurisdictions have held otherwise, and we believe their determination more nearly comports with Wyoming public policy. The controlling facts in *Hughes v. State*, Okla.Crim., 535 P.2d 1023 (1975), are almost identical to the facts in the case here. In Hughes, the keys were merely in the ignition and the accused was unconscious behind the wheel of his parked car.[2] The Oklahoma court found the accused to be in "actual physical control" of an automobile.[3] The court there said:

> "* * * We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had 'actual physical control' of the vehicle within the meaning of the statute. * * *" Id., at 1024.

An intoxicated person seated behind the steering wheel of an automobile is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving; however, the danger does exist and the degree of danger is only slightly less than when the vehicle is moving. As long as a person is physically or bodily able to assert dominion in the sense of movement by starting the car and driving away, then he has substantially as much control over the vehicle as he would if he were actually driving it. *State v. Webb*, 78 Ariz. 8, 274 P.2d 338 (1954); and *State v. Ruona*, supra.

[4] We believe that the legislative intent in enacting the "actual physical control" portion of § 31-5-233(a), W.S.1977, is apprehending the intoxicated driver before he can do any harm by operating a motor vehicle. *Mason v. State*, Okla.Crim., 603 P.2d 1146 (1979); and *Hughes v. State*, supra. Furthermore, the statute is indicative of public policy of the State of Wyoming to discourage intoxicated persons from making any attempt to enter a vehicle except as passengers or passive occupants. *Garcia v. Schwendiman*, supra.

[5] We believe there was sufficient evidence in this case to support the trial court's finding that appellant was "in actual physical control" of his vehicle at the time of his arrest.

Affirmed.

2. We learn some of the details of Hughes from *Mason v. State*, Okla.Crim., 603 P.2d 1146 (1979).

3. The applicable Oklahoma statute was 47 O.S. § 11-902, which in pertinent part, is almost identical to § 31-5-233(a), W.S.1977.

Amado B. GARCIA, Plaintiff and Appellant,

v.

Fred C. SCHWENDIMAN, Chief of Drivers License Division, State of Utah, Defendant and Respondent.

No. 17559.

Supreme Court of Utah

April 1, 1982

Motorist appealed from an order of the Second District Court, Davis County, Douglas L. Cornaby, J., affirming the Department of Public Safety's administrative revocation of his driving privileges under the implied consent statute. The Supreme Court, Durham, J., held that where the motorist occupied the driver's position behind the steering wheel of an automobile, with possession of the ignition key and with the apparent ability to start and move the vehicle, he had "actual physical control" under the implied consent statute, even though he might have been prevented from moving the vehicle by a fence in front and a parked car in the rear.

Affirmed.

1. **Automobiles ⇐144.2(9, 10)**

Showing that arresting officer had grounds to believe that person was in physical control of vehicle is not by itself sufficient to support administrative license revocation for refusal to submit to blood test, but Department of Public Safety must show that operator was in actual physical control of motor vehicle in addition to showing that arresting officer had grounds to believe that operator was then under influence of alcohol; same burdens must be met in district court de novo review. U.C.A. 1953, 41-6-44.10(b).

2. **Automobiles ⇐144.2(10)**

In contrast to prosecutions under criminal statutes, driver's license revocation proceeding requires proof only by preponderance of evidence and not beyond reasonable doubt. U.C.A.1953, 41-6-44.10(b).

3. **Appeal and Error ⇐1009(1, 4)**

Standard for appellate review of factual findings affords great deference to trial court's view of evidence unless trial court has misapplied law or its findings are clearly against weight of evidence.

4. **Automobiles ⇐144.1(1)**

"Actual physical control" language of implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants. U.C.A.1953, 41-6-44.10(a).

See publication Words and Phrases for other judicial constructions and definitions.

5. **Automobiles ⇐144.1(1)**

Where motorist occupied driver's position behind steering wheel of automobile, with possession of ignition key and with apparent ability to start and move vehicle, he had "actual physical control" under implied consent statute, even though he might have been prevented from moving vehicle by fence in front and parked car in rear. U.C.A.1953, 41-6-44.10(a).

6. **Automobiles ⇐144.1(1)**

Fact that motorist occupying driver's position in automobile might be physically obstructed from driving away does not preclude license revocation under implied consent statute. U.C.A.1953, 41-6-44.10(a).

7. **Automobiles ⇐144.2(9)**

To obtain license revocation under implied consent statute, Department of Public Safety need not show that motorist actually intended to exert "actual physical control" over vehicle. U.C.A.1953, 41-6-44.10(a).

Richard W. Brann, Ogden, for plaintiff and appellant.

David L. Wilkinson, Atty. Gen., Bruce M. Hale, Asst. Atty. Gen., Salt Lake City, for defendant and respondent.

DURHAM, Justice:

After a trial de novo, the district court affirmed the defendant's administrative revocation of plaintiff Garcia's driving privileges. Plaintiff appeals from the district court decision and contends that there was insufficient evidence to support the district court's finding that he was in "actual physical control of a motor vehicle" as contemplated by the Utah implied consent statute.

At 6:00 p. m. on November 1, 1980, Officer Gerald Ecker responded to a distur bance complaint at an apartment complex in Sunset, Utah. When he arrived at the complex, Officer Ecker was met by a Mr. Varble, who had positioned his own vehicle behind the automobile of the plaintiff to prevent the plaintiff from backing out of his parking stall. A fence was located approximately three feet in front of the plaintiff's car. Officer Ecker testified that as he approached the Garcia vehicle, he observed the plaintiff alone in the vehicle behind the steering wheel in the "process of starting his motor vehicle" by attempting to turn on the ignition; the officer testified that he saw the keys in the ignition. While there was some dispute about whether or not the key was actually in the ignition, the district court found it "believable that the plaintiff had the keys in the ignition," and it is not disputed that he had the ignition key in his exclusive possession. Officer Ecker observed that plaintiff was apparently under the influence of alcohol. A second police officer, Officer Gale, arrived at the scene, obtained the keys from the plaintiff and, after interviewing Officer Ecker and Mr. Varble, placed the plaintiff under arrest for being in actual physical control of a vehicle while under the influence of alcohol

The plaintiff refused to permit chemical tests of his blood or breath, and consequently received a one-year revocation of his driver's license after an administrative hearing by the Department of Public Safety pursuant to the authority of the Utah implied consent statute, § 41–6–44.10, Utah Code Ann. (1953). This statute provides for revocation of a person's driver's license when he refuses to submit to chemical tests of his blood, breath or urine "for the purpose of determining whether he was driving or in actual physical control of a motor vehicle while under the influence of alcohol." The statute's enforcement provision, § 41–6–44.10(b) U.C.A., requires that the arresting officer have reasonable grounds to believe that the arrested person has been driving or is in actual physical control of a motor vehicle while under the influence of alcohol.

[1] The defendant argues that a showing that the arresting officer had grounds to believe the person was in physical control of a vehicle is by itself sufficient to support an administrative license revocation. We disagree. This Court has previously recognized two separate evidentiary burdens to be borne by the Department of Public Safety in a revocation proceeding The department must show that an operator was "in actual physical control of a motor vehicle" in addition to showing that the arresting officer had grounds to believe that the operator was then under the influence of alcohol. *Ballard v. State*, Utah, 595 P.2d 1302 (1979)

[2] The same burdens must be met in the district court. The district court's jurisdiction, conferred by § 41–6–44.10(b) U.C.A., is limited to a trial de novo "to determine whether the petitioner's license is subject to revocation under the provisions of this act." In *Ballard, supra*, we characterized the trial de novo as "civil and administrative, the purpose of which is for the protection of the public." 595 P.2d at 1304. In contrast to prosecutions under criminal statutes, a license revocation proceeding requires proof only by a preponderance of the evidence and not beyond a reasonable doubt. Since all other matters were resolved by stipulation, the single issue before the district court, and now before us, is whether the defendant proved by a preponderance of the evidence that the plaintiff was "in actual physical control of a motor vehicle" as contemplated by the implied consent statute.

[3] The district court found "from the totality of the facts and the circumstances that the [plaintiff] had actual physical control of the vehicle as required by the Implied Consent Statute." The standard for appellate review of factual findings affords great deference to the trial court's view of the evidence unless the trial court has misapplied the law or its findings are clearly against the weight of the evidence. *Pagano v. Walker*, Utah, 539 P.2d 452 (1975); *Reed v. Alvey*, Utah, 610 P.2d 1374 (1980).

The meaning of "actual physical control" is suggested by the structure of § 41-6-44.10(a), which reads:

> Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests . . . for the purpose of determining whether he was driving *or* in actual physical control of a motor vehicle while under the influence of alcohol .... [Emphasis added.]

The use of the disjunctive "or" strongly suggests an intent to proscribe conduct beyond and different from driving or operating a moving vehicle.[1] Thus, the standard in Utah for determining whether a person was "in actual physical control" of a vehicle is different from the standard used in states which have only "driving" or "operating" language in their statutes. *State v. Daly*, 64 N.J. 122, 313 A.2d 194 (1973), for example, relied upon by plaintiff, was decided under a criminal statute with "operating" language and is not persuasive in this case. Of greater value is the case of *State v. Ruona*, Mont., 321 P.2d 615 (1958), in which the Montana Supreme Court, following an earlier Ohio case, construed a criminal statute with the phrase "drive or be in actual physical control," and adopted the view that:

> . . . the statute defined two distinct offenses, in "operating a vehicle," and "being in actual physical control of a vehicle" while intoxicated.

321 P.2d at 618. This conclusion was likewise reached in *Walker v. State*, Okl.Cr., 424 P.2d 1001 (1967), where the Oklahoma Court of Criminal Appeals held that the use of the disjunctive in Oklahoma's statute resulted in two offenses, one being "to drive or operate" and the other being "to be in actual physical control" of a motor vehicle. The language of Utah's implied consent statute requires the same construction.

A definition of "actual physical control" is contained in *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971). The statute in question there was § 41-6-44, which made it unlawful for any person under the influence of intoxicating liquor "to drive or be in actual physical control of any vehicle within this state." In *Bugger*, the defendant was found asleep in his car, which was completely off the traveled portion of the highway; the motor was not running. This Court held that there was no actual physical control of the vehicle. "Actual physical control" was defined in its ordinary sense to mean "present bodily restraint, directing influence, domination or regulation." 483 P.2d at 443. The Court found, on these facts, that the defendant was "not controlling the vehicle, nor was he exercising any dominion over it." *Id.*

Acts short of starting the motor have been held to constitute actual physical control in other jurisdictions. In *Hughes v. State*, Okl.Cr., 535 P.2d 1023 (1975), the court found a defendant to have been in actual physical control of a vehicle when the vehicle was found improperly parked in a residential area. The defendant was in the front seat, the ignition key was in the ignition, and the motor was turned off. The court said:

> It is our opinion that the legislature, in making it a crime to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor," in-

1. As of 1967, § 41-6-44.10(a) U.C.A. simply stated that "any person operating a motor vehicle" was deemed to have given his consent to chemical tests. In 1969, a new subparagraph (b) was enacted which referred to tests "for the purpose of determining whether he was driving or was in actual physical control of a motor vehicle under the influence . . .," which is the same language found in the current statute. Thus, the Legislature appears to have deliberately expanded the scope of the statute's coverage.

> tended to enable the drunken driver to be apprehended before he strikes . . . .
>
> * * * * * *
>
> We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than when the intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious volition with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away.

535 P.2d at 1024. The same public policy concern for prevention compelled a similar result in *City of Cincinnati v. Kelley*, 47 Ohio St.2d 94, 1 Ohio Ops. 56, 351 N.E.2d 85 (1976). In that case an intoxicated motorist seated in the driver's seat of a legally parked car with his hands on the steering wheel and the keys in the ignition was found to be in actual physical control of his vehicle, even though the engine was off. The court held that the relevant city ordinance provided for two separate offenses, in that it prohibited "operating *or* being in 'actual physical control' of a vehicle while under the influence of alcohol." (Emphasis in original.) From that initial premise, the court concluded that it should interpret the "control" offense in light of the apparent legislative purpose in defining an offense separate from "operating."

> The clear purpose of the control aspect of the instant ordinance is to deter persons from being found under circumstances in which they can directly commence operating a vehicle while they are under the influence of alcohol . . .
>
> * * * * * *
>
> [T]he term "actual physical control," as employed in the subject ordinance, requires that a person be in the driver's seat of a vehicle, behind the steering wheel, in possession of the ignition key, and in such condition that he is physically capable of starting the engine and causing the vehicle to move.

351 N.E.2d at 87. That a preventive purpose should be read into the "actual physical control" language is the opinion of a substantial majority of the jurisdictions interpreting similar statutory language.[2]

In a recent case, *State v. Juncewski*, Minn., 308 N.W.2d 316 (1981), the Supreme Court of Minnesota held that a defendant who had been found inside a pickup truck, seated behind and leaning against the steering wheel was in "actual physical control" of the vehicle. While there was uncertainty as to whether the motor was running, the court held that "[w]hether a motor must be running before a person may be in actual physical control is essentially a policy issue." 308 N.W.2d at 320.

[4, 5] As a matter of public policy and statutory construction, we believe that the "actual physical control" language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants as in *Bugger, supra*. Therefore, under the facts before us, where a motorist occupied the driver's position behind the steering wheel, with possession of the ignition key and with the apparent ability to start and move the vehicle,[3] we hold that there has been an adequate showing of "actual physical control" under our implied consent statute.

2. See, e.g., *State v. Ghylin*, N.D., 250 N.W.2d 252 (1977) (purpose of statute to deter intoxicated persons from getting into their vehicle except as passengers); *State v. Beckey*, 291 Minn. 483, 192 N.W.2d 441 (1971) (purpose of implied consent law to aid enforcement of criminal drunk driving statute); *State v. Halvorson*, Minn., 181 N.W.2d 473 (1970) (purpose to promote traffic safety); *State v. Schuler*, N.D., 243 N.W.2d 367 (1976) (purpose of "actual physical control" statute is preventive)

3. The testimony of Officer Ecker was that plaintiff had the key in the ignition and "was in the process of starting his motor vehicle." He later expressed the view that the plaintiff was having trouble doing so because of the degree of his intoxication, but nothing in the record warrants a finding that the plaintiff was physically unable to start the car, as would be the case with an unconscious or sleeping motorist.

[6] That the plaintiff might have been prevented from moving his vehicle by the fence in front and the parked car of Mr. Varble in the rear does not alter our conclusion. In that respect, our decision comports with cases from other jurisdictions in which there was a physical obstacle preventing actual movement of the vehicle, but the courts nonetheless found actual physical control.[4] The record in this case demonstrates that plaintiff's automobile could have traveled at least a few feet if it had been put into operation.

[7] Similarly, we find it unnecessary for the department to show actual intent under the control provisions of the implied consent statute. Just as an intent to drive is inferred from one's actual driving, so also may an intent to control a vehicle be inferred from the performance of those acts which we have held to constitute actual physical control.

The decision of the district court is affirmed.

HALL, C. J., and STEWART, OAKS and HOWE, JJ., concur.

Q. Ford WILSON and Marilee W. Wilson, et al., Plaintiffs and Appellants,

v.

Alan B. MANNING, City Recorder, City of Fruit Heights, Defendant and Respondent.

No. 17632.

Supreme Court of Utah.

April 1, 1982.

Petitioners brought action for a writ of mandamus commanding a city recorder to submit a rezoning ordinance to a referendum. The Second District Court, Davis County, Thornley K. Swan, J., denied the petition, and appeal was taken. The Supreme Court held that an unsigned minute entry did not constitute an entry of judgment, nor was it final judgment for purposes of applicable rules governing appeals.

Appeal dismissed.

Appeal and Error ⇐78(1)

An unsigned minute entry denying petition for writ of mandamus did not constitute an entry of judgment, nor was it final judgment for purposes of applicable rules governing appeals. Rules Civ.Proc., Rules 58A(b, c), 72(a).

Curtis J. Drake, Salt Lake City, for plaintiffs and appellants.

D. Kent Norton, Salt Lake City, for defendant and respondent.

PER CURIAM:

Petitioners brought this action for a writ of mandamus commanding a city recorder to submit a rezoning ordinance to a referendum. The district court denied the petition in an unsigned minute entry accompanied by a certificate of mailing which directed counsel for the defendant to prepare an order conforming to the minute entry. However, no order appears in the record and apparently none was entered. The notice of appeal states that petitioners appeal "from the minute entry entered in this action."

An unsigned minute entry does not constitute an entry of judgment, nor is it a final judgment for purposes of Utah R.Civ.P. 72(a). Utah R.Civ.P. 58A(b) and (c); *Steadman v. Lake Hills*, 20 Utah 2d 61, 433 P.2d 1 (1967); *Hartford Accident & Indemnity Co. v. Clegg*, 103 Utah 414, 135

4. See, e.g., *State v. Dunbany*, 184 Neb. 337, 167 N.W.2d 556 (1969); *State v. Schuler*, N.D., 243 N.W.2d 367 (1976).

Charles HUGHES, Appellant

The STATE of Oklahoma, Appellee.

No. M-75-174.

Court of Criminal Appeals of Oklahoma.

May 13, 1975.

Rehearing Denied June 5, 1975.

Defendant was convicted in the District Court, Cherokee County, Lynn Burris, J., of actual physical control of motor vehicle while under influence of intoxicating liquor, and he appealed. The Court of Criminal Appeals, Bussey, J., held that where defendant, when arrested, was behind the wheel and could have at any time started it and driven away, he had "actual physical control" of automobile within statute proscribing actual physical control of motor vehicle while under influence of intoxicating liquor and that evidence sustained conviction.

Affirmed.

1. Automobiles ⇐332

Legislature, in making it a crime to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor," intended to enable police to apprehend the drunken driver before he strikes. 47 Okl.St.Ann. § 11-902.

2. Automobiles ⇐332

Where defendant, when arrested, was behind the wheel of car and could have at any time started it and driven away, he had "actual physical control" of automobile within statute proscribing actual physical control of motor vehicle while under influence of intoxicating liquor. 47 Okl.St.Ann. § 11-902.

See publication Words and Phrases for other judicial constructions and definitions.

3. Automobiles ⇐355(6)

Evidence sustained conviction of actual physical control of motor vehicle while under influence of intoxicating liquor. 47 Okl.St.Ann. § 11-902.

An appeal from the District Court, Cherokee County; Lynn Burris, Judge.

Charles Hughes, appellant, was convicted of the offense of Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor; was sentenced to thirty (30) days in the County Jail and fined in the amount of One Hundred ($100.00) dollars, and appeals. Judgment and sentence affirmed.

John T. Lawson, Tahlequah, for appellant.

Larry Derryberry, Atty. Gen., Michael Jackson, Asst. Atty. Gen., for appellee.

OPINION

BUSSEY, Judge:

Appellant, Charles Hughes, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Cherokee County, Case No. CRM-73-389, for the crime of Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor (47 O.S. § 11-902). His punishment was fixed at a term of thirty (30) days in the County jail and a fine of One Hundred ($100.00) dollars. From said judgment and sentence, a timely appeal has been perfected to this Court.

Briefly stated, the facts are that on September 3, 1973, at approximately 9:00 p. m., Don Fields, a trooper for the Oklahoma Highway Patrol, was called to investigate an improperly parked vehicle in the Sharon Hills Addition of Cherokee County. Upon arriving at the scene, he observed a 1972 Buick, white over gold, sitting at a 90 degree angle on the roadway. He observed two people in the automobile. The defendant was situated in the front seat with his feet on the front floorboard underneath the steering wheel and his head was down leaning towards the passenger side of the automobile. Trooper Fields

gained entry to the vehicle by arousing the defendant's son who was asleep in the back seat. The ignition key was in the ignition. After arousing the defendant, Trooper Fields observed that the defendant was unstable on his feet, his speech was slurred, his eyes were bloodshot, and he smelled "very strong of alcoholic beverage." In Trooper Fields' opinion the defendant was very intoxicated.

The defendant did not take the stand nor offer any evidence in his behalf.

Defendant's sole assignment of error asserts that the evidence presented in this case was wholly insufficient to support a conviction of the crime of Actual Physical Control of a Motor Vehicle While Under the Influence of Intoxicating Liquor.

In the case of Parker v. State, Okl.Cr., 424 P.2d 997 (1967), this Court held in Syllabi two and three:

"2. Actual physical control, as used in Title 47 O.S.A. § 11-902(a), means: existing or present bodily restraint, directing influence, domination or regulation of any automobile, while under the influence of intoxicating liquor.

"3. If a person has existing or present bodily restraining, directing influence, domination or regulation of an automobile, while under the influence of intoxicating liquor, he commits an offense within the provisions of the statute."

In the case of State v. Wilgus, Ohio Com.Pl., 17 Ohio Supp. 34 (1954), in which the Ohio Supreme Court was construing a statute similar to the instant statute, that court held that the statute defined two distinct offenses, "operating a vehicle," and "being in actual physical control of a vehicle" while intoxicated. The court further held that the control contemplated meant more than the "ability to stop an automobile," but meant the "ability to keep from starting," "to hold in subjection," "to exercise directing influence over," and "the authority to manage."

[1] It is our opinion that the legislature, in making it a crime to be in "actual physical control of a motor vehicle while under the influence of intoxicating liquor," intended to enable the drunken driver to be apprehended before he strikes. As was stated in the case of State v. Harold, 74 Ariz. 210, 246 P.2d 178 (1952):

". . . It appears to us to be even more important for the legislature to prevent operators of cars who are under the influence of intoxicating liquors or who are at the time driving recklessly and in wilful and wanton disregard for the safety of persons or property, from entering upon the highways and into the stream of traffic than to permit them to enter thereon and after a tragic accident has happened to punish them for maiming or causing the death of those who are lawfully in the use of such highways. . . ."

[2, 3] We believe that an intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than where an intoxicated person is actually driving a vehicle, but it does exist. The defendant when arrested may have been exercising no conscious violation with regard to the vehicle, still there is a legitimate inference to be drawn that he placed himself behind the wheel of the vehicle and could have at any time started the automobile and driven away. He therefore had "actual physical control" of the vehicle within the meaning of the statute. We, therefore, find there was sufficient competent evidence to support the verdict.

Finding no error sufficient to warrant modification or reversal, it is our opinion that the judgment and sentence appealed from should be, and the same is hereby, affirmed.

BRETT, P. J. and BLISS, J., concur.

consider whether and under what circumstances recusal may be required in administrative adjudications when the specific provisions of section 54-7-1.5 do not apply. Plainly, having participated in a rule making proceeding does not automatically preclude a commissioner from participating in a later, properly conducted adjudication.

We have considered the other issues raised and find their disposition unnecessary to the result. The Commission's rule is of no force and effect, and its order is vacated. The matter is remanded for proceedings consistent with this opinion.

HALL, C.J., and STEWART, HOWE and DURHAM, JJ., concur.

Jose Antonio LOPEZ, Plaintiff and Appellant,

v.

Fred C. SCHWENDIMAN, Chief, Driver License Services, Utah Department of Public Safety, Defendant and Respondent.

No. 20112.

Supreme Court of Utah.

June 12, 1986.

Utah State Driver License Division revoked driving privileges of driver for period of one year. The Seventh District Court, Carbon County, Richard C. Davidson, J., affirmed the administrative decision. Driver appealed. The Supreme Court, held that: (1) statute providing for arrest of one "in actual physical control" of vehicle while under the influence of alcohol and/or drugs was intended by legislature to protect public safety and apprehend drunken driver before he or she strikes and may not be construed to exclude those whose vehicles are presently immobile because of mechanical trouble, and (2) driver's refusal to submit to breath test upon rumors that there had been incidents of tampering with breathalyzer in the past was nevertheless refusal, subjecting defendant to license revocation.

Affirmed.

1. Automobiles ⇐144.2(9)

In revocation proceeding, Driver Division has burden to show that operator of vehicle was in actual physical control of motor vehicle and that arresting officer had grounds to believe that operator was under influence of alcohol.

2. Automobiles ⇐144.2(10)

In trial de novo, district court must determine by preponderance of evidence whether driver's license was subject to revocation for driving under the influence of alcohol. U.C.A.1953, 41-6-44.10.

3. Automobiles ⇐144.2(3)

Supreme Court's review of district court's determination as to whether driver's license was subject to revocation for driving while under the influence of alcohol is deferential to trial court's view of evidence unless trial court has misapplied principles of law or its findings are clearly against weight of evidence.

4. Automobiles ⇐144.1(1)

Even if truck was inoperable at time that licensee was found sleeping in it and arrested, that would not preclude him from having "actual physical control" over truck so that his driver's license could be revoked if he had statutorily prohibited blood alcohol content. U.C.A.1953, 41-6-44.10(1, 2).

5. Automobiles ⇐349

Statute providing for arrest of one "in actual physical control" of vehicle while under the influence of alcohol and/or drugs was intended by legislature to protect public safety and apprehend drunken driver before he or she strikes and may not be construed to exclude those vehicles are presently immobile because of mechanical

trouble. U.C.A.1953, 41-2-19.5, 41-6-44.-10(2).

6. Automobiles ⇐144.2(10)

District court's findings that vehicle had reached its point of rest under its own power and that licensee had failed field sobriety test, were supported by competent evidence, and would not be disturbed by Supreme Court.

7. Automobiles ⇐144.1(1)

Refusal to take breathalyzer test simply means that arrestee was asked to take breath test decline to do so of his own volition.

8. Automobiles ⇐144.2(8)

Whether or not driver's refusal to take breath test is conditional or reasonable makes no difference; result is still license revocation of one year. U.C.A.1953, 41-6-44.10.

9. Automobiles ⇐144.1(1)

Refusal to answer yes or no to request to taking breath test is still refusal, for purpose of license revocation. U.C.A. 1953, 41-6-44.10.

10. Automobiles ⇐144.1(1)

Driver's licensee admitted that he had been requested to submit to breath test and that he had refused, invoking sanction of revocation of his license. U.C.A.1953, 41-6-44.10.

11. Appeal and Error ⇐181

Supreme Court will not review alleged error when no objection at all is made at trial level.

Phil L. Hansen, (Lopez), Salt Lake City. for plaintiff and appellant.

David L. Wilkinson, Atty. Gen., Bruce M. Hale, Asst. Atty. Gen., Salt Lake City, for defendant and respondent.

PER CURIAM:

The Utah State Driver License Division revoked the driving privileges of petitioner Lopez for a period of one year pursuant to U.C.A., 1953, § 41-6-44.10 (1981 ed.). After a trial de novo, the trial court affirmed the administrative decision. Lopez appeals and contends: (1) it was error to find that Lopez was in actual physical control of his vehicle when he was asleep at the wheel and the vehicle was inoperable; (2) his refusal to take a breath test was reasonable; and (3) it was error to allow testimony on Lopez's breath test refusal when Lopez did not know that he was under arrest. We affirm.

At approximately 3:00 a.m. on March 18, 1984, Officers Anderson and Schofield were separately dispatched to investigate a prowler report. En route, Schofield was flagged down by an individual who pointed to Lopez's truck parked by a public telephone booth adjacent to Sunnyside City Hall. The truck's motor was not running. There were vehicle tracks from the pickup in the freshly fallen snow. When Schofield approached the truck, Lopez was sitting in the driver's seat with his head resting on the steering wheel. Schofield tapped on the window, assisted Lopez in opening the door to talk to him, and had to catch him when he fell more than stepped out of his truck. Schofield smelled alcohol on Lopez's breath. Lopez was drooling, had very poor balance, and needed support to stand. When asked to produce a driver license, Lopez initially handed the officer a child's picture. Schofield removed the keys from the ignition and had to turn them to get them out.

After Officer Anderson arrived, both officers asked Lopez to perform several field sobriety tests, which he failed. Lopez at one point stated, "Was I driving, I was just waiting for a phone call." Lopez was placed under arrest, handcuffed, and placed in the patrol car. Both officers testified that Lopez asked several times what he was arrested for. Officer Anderson then requested Lopez to submit to a breath test to determine the alcohol content in his blood. Lopez responded, "I took your tests. I passed your tests." Lopez was transported to the sheriff's station, where he was again asked to submit to the breath test, was advised that he would be permit-

ted to have an additional test administered by a physician of his own choice, and was warned that his refusal to submit to the test could result in revocation of his license for one year. Lopez did not respond.

At trial, Lopez stated for the first time that his wife had been driving the truck when the battery died. He had been waiting in the truck for her to bring the car to tow the truck home. He admitted that he had not told the officers about any dead battery or dead car. He admitted that he understood that he had been arrested for driving while under the influence. Lopez also testified that he had refused the officer's request to take the breath test because he "didn't trust them" and that he had conducted the field sobriety tests well enough to prove that he had not been drinking. He also confirmed that he had been told that he would lose his license if he refused.

From the evidence so adduced, the trial court found by a preponderance that there was probable cause to arrest Lopez, that he had been requested to take the breath test, and that he had been warned of the consequences if there was a refusal. The court found the arrest proper because Lopez was alone in the car, had the keys to the vehicle, "there were tire tracks leading up to the vehicle, the vehicle got there apparently on its own power," and Lopez had failed the field sobriety tests.

[1-3] In a revocation proceeding, the Driver License Division has the burden to show that the operator of a vehicle was "in actual physical control of a motor vehicle" and that the arresting officer had grounds to believe that the operator was then under the influence of alcohol. *Garcia v. Schwendiman*, 645 P.2d 651, 652 (Utah 1982); *Ballard v. State*, 595 P.2d 1302 (Utah 1979). In a trial de novo, the district court must determine by a preponderance of the evidence "whether the petitioner's license is subject to revocation under the provisions of this chapter." § 41-6-44.10(2), *supra; Garcia*, 645 P.2d at 652. Our review of that determination is deferential to the trial court's view of the evidence unless the trial court has misapplied principles of law or its findings are clearly against the weight of the evidence. *Id.* at 653.

Lopez first argues that the Driver License Division failed to meet the statutory requirements that he had "actual physical control" of the vehicle when he was arrested. Section 41-6-44.10(1) reads in pertinent part:

> Any person operating a motor vehicle in this state shall be deemed to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was driving *or in actual physical control* of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug ... so long as the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been driving or in actual physical control of a motor vehicle while having a blood alcohol content statutorily prohibited, or while under the influence of alcohol, any drug, or combination of alcohol and any drug....

Lopez compares his situation to the facts of *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971), where the driver of the vehicle had parked his car completely off the road, had turned off the motor, and was sleeping. Nothing in that case indicates that the driver was in the driver's seat at the time he was found and arrested. "Positioning in the driver's seat is an element common to all of the cases that have found actual physical control of a motionless vehicle." *State v. Smelter*, 36 Wash. App. 439, 674 P.2d 690 (1984). *See also Adams v. State*, 697 P.2d 622 (Wyo.1985); *Huges v. State*, 535 P.2d 1023 (Okla.Crim. 1975); *but compare Bearden v. State*, 430 P.2d 844 (Okla.Crim.1967), where the driver lay unconscious on the ground beside his pickup truck. The courts upholding convictions in these and similar fact situations start out from the premise that as long as a person is physically able to assert domin-

ion by starting the car and driving away, he has substantially as much control over the vehicle as he would if he were actually driving it. *Adams v. State*, 697 P.2d at 625.

[4, 5] Nonetheless, Lopez claims that his car was inoperable at the time of his arrest and that the statutory burden was therefore not borne by the Driver License Division as he was unable to start the car and drive it away. We note initially that Lopez first told this version of the events leading to his arrest when he took the stand in his trial de novo. No substantiating evidence was offered to buttress his assertion. Under the circumstances, the trial court may well have disbelieved him and given little weight to his testimony. Assuming *arguendo* that Lopez's truck was indeed disabled, jurisdictions with similar statutes as ours have nonetheless found "actual physical control" of the driver over the disabled car. The rationale was forcefully voiced in *State v. Smelter*, 674 P.2d at 693:

> The focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidence permits a legitimate inference that the car was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in actual physical control. To hold otherwise could conceivably allow an intoxicated driver whose vehicle was rendered inoperable in a collision to escape prosecution.

Citing Commonwealth v. Taylor, 237 Pa. Super.212, 352 A.2d 137 (1975). Utah's statute provides for the arrest of one "in actual physical control" of the vehicle while under the influence of alcohol and/or drugs. That requirement was intended by our legislature to protect public safety and apprehend the drunken driver before he or she strikes, § 41–2–19.5; *Garcia*, 645 P.2d at 654; *accord Ballard v. State*, *supra*, and may not be construed to exclude those whose vehicles are presently immobile because of mechanical trouble. *State v. Smelter*, *supra*.

[6] The trial court here found that there were tire tracks leading up to the vehicle, that the vehicle had to have reached its point of rest "apparently on its own power," and that Lopez had failed the field sobriety tests. Those findings are supported by competent evidence and will not be disturbed by this Court.

[7–10] At trial, Lopez based his refusal to submit to a breath test upon the rumors that there had been incidents of tampering with the breathalyzer in the past. His retort to the officers at the scene was that he had taken the tests and passed them. A refusal simply means that an arrestee who is asked to take a breath test "declines to do so of his own volition." *Cavaness v. Cox*, 598 P.2d 349 (Utah 1979). Whether or not that refusal is conditional makes no difference. *Id.* Likewise, it makes no difference whether or not a refusal is reasonable. The result is still a license revocation of one year. By the same token, a refusal to answer yes or no to a request to take a breath test is still a refusal. *Beck v. Cox*, 597 P.2d 1335 (Utah 1979). Lopez admitted that he had been requested to submit to the test and that he had refused. No more was required to invoke the sanction of the statute. § 41–6–44.10(2), *supra*.

[11] We do not reach the merits of Lopez's claim that testimony on his refusal to take the breath test was inadmissible because he was not aware that he was under arrest. Lopez's counsel did not object, but actively solicited that testimony from Lopez on cross-examination. This Court will not review alleged error when no objection at all is made at the trial level. *State v. Lesley*, 672 P.2d 79 (Utah 1983).

The judgment is affirmed.

arm or knife and retained only the general term "dangerous weapon," Utah Code Ann. § 76–6–302(1)(a) (Supp.1989), as do the statutes setting forth the elements of other "aggravated" crimes, *e.g.*, Utah Code Ann. § 76–5–103 (Supp.1989) (aggravated assault); Utah Code Ann. § 76–6–203 (Supp. 1989) (aggravated burglary). We agree with the State that this change to conform the language of the aggravated robbery statute evinces the legislature's intent that the sentence enhancement provision apply uniformly to all aggravated crimes, including aggravated robbery.

Although it is unclear why the legislature amended section 76–6–302(1)(a) in 1975 to add the specific term "firearm" to the aggravated robbery statute, since robbery committed with a firearm was already covered by the general term "deadly weapon" retained in the subsection, we conclude that the amendment created no ambiguity over what penalty the legislature intended for robbery committed with a firearm. The legislature was merely increasing the degree of a robbery committed with the enumerated instruments of violence. In its subsequent adoption of the enhancement provision for firearm use in the commission of a first degree felony, the legislature exercised its authority to determine that, because firearms are more dangerous than knives or other deadly weapons, their use was more deserving of enhanced punishment. *See Angus*, 581 P.2d at 994–95.

Finally, Webb asserts that, even if the enhancement provisions of section 76–3–203(1) are applicable to his aggravated robbery conviction, the trial court erroneously imposed a total of six years as the term of enhancement. Based on the Utah Supreme Court's interpretation of the firearm enhancement statute as providing for a maximum enhancement term of five years, *State v. Willett*, 694 P.2d 601 (Utah 1984), the State concedes that the trial court erroneously imposed a six-year enhancement term.

We, therefore, direct the trial court upon remand to reduce the enhancement sentence for use of a firearm in the commission of the first degree felony of aggravated robbery from a total of six years to a total of five years. With this correction of the sentence, Webb's conviction is affirmed.

BENCH, J., and J. ROBERT BULLOCK, Senior District Judge, concur.

RICHFIELD CITY, Plaintiff and Respondent,

v.

James M. WALKER, Defendant and Appellant.

No. 890156–CA.

Court of Appeals of Utah.

March 26, 1990.

Driver was convicted in the Sixth Circuit Court, Sevier County, David L. Mower, J., of being in actual, physical control of vehicle while having blood alcohol level of .21%. Driver appealed. The Court of Appeals, Garff, J., held that: (1) city ordinance under which driver was convicted was consistent with statutes, and (2) driver was in actual, physical control of truck while he was sleeping.

Affirmed.

1. Criminal Law ⇐254.2, 260.11(3)

Stipulated facts were not functional equivalent of findings of fact, and, thus, Court of Appeals was not required to defer to trial court's findings.

2. Automobiles ⇐316

Municipal Corporations ⇐592(2)

Statutory prohibition against driving or being in actual physical control of vehicle with blood alcohol content of .08% or greater as shown by chemical test given within two hours after alleged operation or

physical control was consistent with ordinance that did not include language about chemical test within two hours; another provision of ordinance stated that blood alcohol level at time of alleged offense was presumed to be at least equal to level determined by chemical test within two hours of alleged driving or actual physical control. U.C.A.1953, 41-6-43, 41-6-44(1), 41-6-44.5(2).

3. **Automobiles** ⇐316
Municipal Corporations ⇐592(2)

Penalty provision of ordinance prohibiting driving under influence of alcohol was consistent with statute indicating that first violation was Class B misdemeanor; ordinance permitted imprisonment for 60 days to six months and fine of $299 and merely contained longhand description of penalty for Class B misdemeanor. U.C.A.1953, 41-6-43, 41-6-44(3), 76-3-201(1), 76-3-201(2), 76-3-204(2); U.C.A.1953, 76-3-30(1978).

4. **Automobiles** ⇐316
Municipal Corporations ⇐592(2)

DUI ordinance allowing only for measurement of blood alcohol content of driver was consistent with statute allowing driver's intoxication level to be determined by measuring alcohol content in breath or blood. U.C.A.1953, 41-6-43, 41-6-44.

5. **Municipal Corporations** ⇐592(1)

Municipal ordinance need not be identical to controlling state statute to be consistent with it.

6. **Automobiles** ⇐332

Totality of circumstances must be considered to determine whether driver was in actual physical control of vehicle while driver was under influence of alcohol. U.C.A.1953, 41-6-44.

7. **Automobiles** ⇐332

Two of the more persuasive indicia of actual physical control while driver is under influence of alcohol are how vehicle got to where it was found and whether defendant drove it there. U.C.A.1953, 41-6-44.

8. **Automobiles** ⇐332

Relevant factors for determining whether driver was in actual physical control of vehicle while driver was under influence of alcohol include the following: driver's sleep; position of vehicle; running engine; driver's position in driving seat; existence of other occupants; driver's possession of key; driver's apparent ability to start and move vehicle; manner in which vehicle got to where it was found; and driver's operation of vehicle to where it was found. U.C.A.1953, 41-6-44.

9. **Automobiles** ⇐332

Driver who was sleeping in truck was in "actual, physical control" while he was under influence of alcohol; although driver's head was toward passenger door and engine was not running, keys were in ignition, and headlights were on· driver had driven truck to its position in parking lot. U.C.A.1953, 41-6-44.

See publication Words and Phrases for other judicial constructions and definitions.

Shelden R. Carter, Harris, Carter & Harrison, Provo, for defendant and appellant.

Richard K. Chamberlain, Richfield, for plaintiff and respondent.

Before BENCH, GARFF and LARSON,[1] JJ.

OPINION

GARFF, Judge:

Defendant James M. Walker appeals from his conviction of being in actual physical control of a vehicle while having a blood alcohol level of .21%, in violation of Richfield City Ordinance 1983-2. We affirm.

At a bench trial, the following facts were stipulated to by the parties. In the early morning hours of June 30, 1987, defendant drove to the Richfield Quality Inn, seeking a room. After being informed that there were no vacancies, he returned to his truck

1. John Farr Larson, Senior Juvenile Judge, sitting by special appointment pursuant to Utah Code Ann. § 78-3-24(10) (Supp.1989).

in the parking lot and went to sleep. Subsequently, he was discovered by a Sevier County sheriff's deputy, who found defendant's truck with the engine off and the headlights on. The doors were unlocked and the keys were in the ignition. Defendant was asleep on the seat, with his head toward the passenger door and a blanket over him. Within thirty minutes of his arrest, defendant submitted to an intoxilyzer test that registered his blood alcohol level at .21%.

Defendant does not dispute his intoxicated state. He contends that: (1) the Richfield City ordinance under which he was convicted is invalid, and (2) he did not have actual physical control over the vehicle.[2]

[1] Because this matter was presented on stipulated facts, which are "the functional equivalent" of findings of fact, we do not defer to the trial court's findings. *Dover Elevator Co. v. Hill Mangum Invests.*, 766 P.2d 424, 426 (Utah Ct.App.1988). Where the facts are not in material dispute, the interpretation placed thereon by the trial court becomes a question of law, which is not conclusive on appeal. *Diversified Equities, Inc. v. American Sav. & Loan Ass'n*, 739 P.2d 1133, 1136 (Utah Ct.App.1987).

VALIDITY OF THE RICHFIELD ORDINANCE

Utah's present DUI statutes, contained in Utah Code Ann. title 41, were enacted in 1983. Utah Code Ann. § 41-6-43 (1983) requires consistency between state law and local ordinances:

> An ordinance adopted by a local authority that governs a person's driving or being in actual physical control of a motor vehicle while having alcohol in the blood ... or that governs, in relation to any of those matters, the use of a chemical test or chemical tests, or evidentiary presumptions, or penalties or that governs any combination of those matters, shall be consistent with the provisions in this code which govern those matters.

Accordingly, Richfield City adopted all of the 1983 amendments to Utah Code Ann. § 41-6-44 (1983) in its city ordinance 1983-2. After 1983, the legislature enacted additional amendments to title 41 which were not explicitly adopted by Richfield City. Defendant contends that the Richfield City ordinance is invalid because it is now inconsistent with section 41-6-44.

There can be no question that, at the time it was enacted, the Richfield City ordinance was consistent with the statute. Therefore, the only question is whether Richfield City's failure to adopt subsequent amendments made its ordinance inconsistent and, therefore, unenforceable.

[2] We have examined both the statute and the ordinance and, although we agree that differences exist, we find that those differences do not amount to an invalidating inconsistency.

First, defendant alleges that the 1987 amendment to section 41-6-44 significantly and substantially alters the description of the offense, thereby leaving the Richfield City ordinance inconsistent and invalid. The version adopted by Richfield City, Utah Code Ann. § 41-6-44(1) (1983), states, in pertinent part, that:

> [i]t is unlawful and punishable as provided in this section for any person with a blood alcohol content of .08% or greater by weight ... to drive or be in actual physical control of a vehicle within this state.

The 1987 amendment to section 41-6-44(1) added language stating that it is unlawful

2. In *Garcia v. Schwendiman*, 645 P.2d 651, 652 (Utah 1982), the Utah Supreme Court stated that the language of Utah Code Ann. § 41-6-44(10) (1953 as amended), "driving or in actual physical control of a motor vehicle," describes two distinct offenses: one, operating a motor vehicle, and the other, being in actual physical control of a vehicle. Although section 41-6-44(10) has since been repealed, Utah Code Ann. § 41-6-44 (1988) has comparable language, "operate or be in actual physical control of a vehicle." Following the reasoning in *Garcia*, we interpret section 41-6-44 to also describe two distinct offenses, operating a motor vehicle and being in actual physical control. In the present case, the information only charged defendant with having "actual physical control of a vehicle with blood alcohol content of .08% or greater." It did not charge him with operating the vehicle.

for a person to drive or be in actual physical control of a vehicle with a blood alcohol content of .08% or greater "as shown by a chemical test given within two hours after the alleged operation or physical control." Utah Code Ann. § 41-6-44(1)(a) (1987). The nature of the offense and the prohibited conduct are not changed by this amendment, which only further describes the conditions that will result in a presumption of intoxication.

In any event, these conditions were already included in another provision of the city ordinance. Section 2 of the ordinance adopted, by reference, the provisions of Utah Code Ann. § 41-6-44.5(2) (1983), which states:

> If the chemical test was taken within two hours of the alleged driving or actual physical control, the blood alcohol level of the person at the time of the alleged driving or actual physical control shall be presumed to be not less than the level of the alcohol determined to be in the blood by the chemical test.

Thus, the same presumption created by the 1987 amendment is created by combining this provision with subsection 1 of the ordinance. "Unless legislative provisions are contradictory in the sense that they cannot coexist, they are not to be deemed inconsistent because of mere lack of uniformity in detail." *Salt Lake City v. Kusse*, 97 Utah 113, 93 P.2d 671, 673 (1938). Consequently, the ordinance is consistent with the statute.

[3] Second, defendant alleges that the 1987 amendment conflicts with the ordinance because Utah Code Ann. § 41-6-44(3) (1987) indicates that persons convicted of a first violation are guilty of a class B misdemeanor, while the ordinance states that punishment shall be by "imprisonment for not less than 60 days nor more than six months, or by a fine of $299," or both. Richfield City Ordinance 1983-2(1.3).

"A municipal ordinance is not in conflict with a statute authorizing its adoption because of a difference in penalties." *Salt Lake City v. Allred*, 20 Utah 2d 298, 437 P.2d 434, 436 (1968) (quoting 37 Am.Jur., *Municipal Corporations*, § 165). However, the penalty portion of an ordinance is void if it conflicts with the general state law governing the subject.

Here, both the ordinance and the statute describe class B misdemeanors. The ordinance merely contains a longhand description of the penalty for a class B misdemeanor as set forth in Utah Code Ann. § 76-3-204(2) (1978), imprisonment "for a term not exceeding six months." Therefore, it is not inconsistent with the statute. The ordinance also imposes a fine of up to $299.[3] Utah Code Ann. § 76-3-201(1) (1978) allows a court, within limits prescribed by statute, to sentence a guilty person to pay a fine, to be imprisoned, or both. Section 76-3-201(2) (1978) also allows a court to include a civil penalty in a sentence. Utah Code Ann. § 76-3-30 (1978) allows a court to impose a fine of up to $299 for a class B misdemeanor.

The punishment actually imposed upon defendant was a forty-eight hour jail sentence and a $299 fine, plus a $250 assessment for drunk driving school and victim restitution. Thus, defendant's actual punishment was consistent with the terms of both the ordinance and the statute.

[4] Third, defendant contends that the statute and the ordinance are inconsistent because the 1987 amendment to section 41-6-44 allows a person's intoxication level to be determined by measuring the alcohol content in either the breath or the blood, while Richfield City Ordinance 1983-2(1.1) only allows for measurement of blood alcohol content. Because the ordinance follows one of the two statutorily prescribed methods, it is consistent with the statute.

[5] We conclude that the municipal ordinance need not be identical to the controlling state statute to be consistent with it. In *Kusse*, the supreme court addressed the issue of discrepancies between state and municipal legislation, stating, " 'In determining whether an ordinance is in conflict with general laws, the test is whether the ordinance permits or licenses that which

3. Subsequent amendments to the Utah Code have increased the potential fine to $1,000.

the statute forbids and prohibits, and vice versa.' Judged by such a test, an ordinance is in conflict if it forbids that which the statute permits." *Kusse*, 93 P.2d at 673 (quoting *State v. Carran*, 133 Ohio St. 50, 11 N.E.2d 245, 246 (1937)). Following this reasoning in *Layton City v. Glines*, 616 P.2d 588 (Utah 1980), the supreme court also indicated that, "[t]he fact the municipal ordinance does not encompass all the proscriptions of the state regulation does not render it in conflict with that statute." *Id.* at 589. Because we find no conflicts or inconsistencies in the differences pointed out by defendant, we hold that the ordinance is valid.

ACTUAL PHYSICAL CONTROL

Defendant claims that even if the ordinance is valid, he should not have been convicted because he was not in actual physical control of his truck when he was found asleep inside it.

Initially, we examine the public policy behind the laws prohibiting being in actual physical control of a vehicle while intoxicated:

> In general, laws prohibiting driving while intoxicated are deemed remedial statutes, to be "liberally interpreted in favor of the public interest and against the private interests of the drivers involved." Specifically, actual physical control statutes have been characterized as "preventive measure[s]," which "deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers," and which "enable the drunken driver to be apprehended before he strikes."

State v. Smelter, 36 Wash.App. 439, 674 P.2d 690, 693 (1984) (citations omitted) (quoting *State v. Juncewski*, 308 N.W.2d 316, 319 (Minn.1981); *see also State v. Webb*, 78 Ariz. 8, 274 P.2d 338, 339 (1954); *State v. Ghylin*, 250 N.W.2d 252, 255 (N.D.1977); *State v. Schuler*, 243 N.W.2d 367, 370 (N.D.1976)).

In *Garcia v. Schwendiman*, 645 P.2d 651 (Utah 1982), our supreme court stated that

> [a]s a matter of public policy and statutory construction, we believe that the "actual physical control" language of Utah's implied consent statute should be read as intending to prevent intoxicated drivers from entering their vehicles except as passengers or passive occupants....

Id. at 654.

We, therefore, apply the law to the facts of this case in a manner consistent with the public policy that intoxicated motorists should be kept out of their vehicles except as passengers or passive occupants, and should be apprehended before they strike.

[6] A review of the relevant cases convinces us that we must look to the totality of the circumstances to determine whether defendant was in actual physical control of his vehicle. In *State v. Bugger*, 25 Utah 2d 404, 483 P.2d 442 (1971), the Utah Supreme Court held that an intoxicated motorist, asleep in his car, was not in actual physical control of his vehicle. The court recited *Bugger*'s meager facts as follows: "The defendant was asleep in his automobile which was parked upon the shoulder of a road. .. The automobile was completely off the traveled portion of the highway and the motor was not running." *Id.*

In *Lopez v. Schwendiman*, 720 P.2d 778 (Utah 1986) (per curiam), the supreme court held that an intoxicated motorist, asleep at the wheel in his inoperable truck, was in actual physical control of his vehicle. It did not overrule *Bugger* but distinguished it, stating, "Nothing in [*Bugger*] indicates that the driver was in the driver's seat at the time he was found and arrested." *Id.* at 780. It concluded that "[p]ositioning in the driver's seat is an element common to all of the cases that have found actual physical control of a motionless vehicle." *Id.* (quoting *Smelter*, 674 P.2d at 692); *see also Fieselman v. State*, 537 So.2d 603 (Fla.Dist.Ct.App.1988); *State v. Peterson*, 769 P.2d 1221 (Mont.1989). Nothing in *Bugger* indicates that the driver was *not* in the driver's seat at the time he was arrested. However, *Lopez* implies that Bugger was not behind the wheel, despite the fact that nothing in *Bugger* permits that as-

sumption. Thus, positioning in the driver's seat is a significant but not necessarily the determining factor in ascertaining actual physical control.

The *Lopez* court further found that where the lone occupant in a vehicle was positioned in the driver's seat, had possession of the ignition key, and had the apparent ability to start and move the vehicle, he was in actual physical control. Although *Bugger* was silent as to other indicia of actual physical control, *Lopez* suggests that possession of the ignition key and the ability to start and move the vehicle are relevant factors.[4]

[7] How the car got to its present resting place is an additional, critical factor. The Washington Supreme Court, in *Smelter*, stated that:

> [the] focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidence permits a legitimate inference that the car was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in actual physical control.

Id. at 693. The defendant in *Smelter* was found sitting behind the wheel of his stopped car, which had run out of gas on the shoulder of the highway. We agree with the Washington court that some of the more persuasive indicia of actual physical control are how the car got to where it was found and whether the defendant drove it there.

Garcia suggests that "passive occupants" are, categorically, not in actual physical control of a vehicle in its statement that the intent of the implied consent statute is to "prevent drivers from entering their vehicles except as passengers or as passive occupants as in *Bugger.*" *Garcia*, 645 P.2d at 654. In an explanatory footnote, the *Garcia* court further states that "nothing in the record warrants a finding that the plaintiff was physically unable to start the car, as would be the case with an unconscious or sleeping motorist." *Id.* n. 3. This dictum does not further define a "passive occupant." Further, because the driver was not asleep in *Garcia*, *Garcia* is factually inapposite to the present situation. Thus, we do not construe this language in *Garcia* as compelling a determination that a driver is not in actual physical control of his vehicle based upon only the fact that he is asleep.

Fieselman v. State, 537 So.2d at 603, is factually identical with the instant case. Fieselman was charged with being in actual physical control of a vehicle while under the influence of alcohol. He was found lying down, asleep, on the front seat of his car which was parked in a parking lot. The car's lights were on and the engine was not running. The Florida court determined that while these facts, alone, were insufficient to find that the defendant was in actual, physical control of the vehicle, the additional fact of the key found in the ignition was sufficient. *Id.* at 606. The court concluded, from the evidence, that:

> a reasonable inference can be drawn that Fieselman, while intoxicated, placed the keys in the ignition and thus was at least at that moment in actual physical control of the vehicle while intoxicated.
>
> We believe that such an inference can be drawn since a person who has placed keys in the ignition of a vehicle may be as much in actual physical control of the vehicle as a person seated behind the wheel of the vehicle. As the court recognized in *Griffin* [*v. State*, 457 So.2d 1070 (Fla.Dist.Ct.App.1984)], a legitimate inference to be drawn from the defendant's sitting position behind the wheel is that the defendant "could have at any time started the automobile and driven away"; this inference is no less legitimate when it is drawn from the presence of the keys in the ignition....
>
> ....

4. The supreme court, in *Lopez*, found that our statute pertaining to actual physical control "may not be construed to exclude those whose vehicles are presently immobile because of mechanical trouble." *Lopez*, 720 P.2d at 781.

> Lastly, we point out that evidence that the key was in the ignition does not inexorably lead to the conclusion that the defendant was in actual physical control of the vehicle. It is merely a fact—along with the defendant's presence asleep and intoxicated in the vehicle—which, being capable of establishing the defendant's actual physical control of the vehicle, precludes the conclusion that *as a matter of law* the defendant was not in actual physical control of the vehicle
>
> ....

Id. at 606-07.

[8] In summary, we look to the totality of the circumstances to determine whether defendant was in actual physical control of his vehicle. Relevant factors for making this determination include, but are not limited to the following: (1) whether defendant was asleep or awake when discovered; (2) the position of the automobile; (3) whether the automobile's motor was running; (4) whether defendant was positioned in the driver's seat of the vehicle; (5) whether defendant was the vehicle's sole occupant; (6) whether defendant had possession of the ignition key; (7) defendant's apparent ability to start and move the vehicle; (8) how the car got to where it was found; and (9) whether defendant drove it there.

[9] In the present case, the following facts are relevant: defendant, the vehicle's sole occupant, was asleep in a prone position on the seat with his head toward the passenger door. Although the vehicle's motor was not running, the keys were in the ignition and the headlights were on. Defendant had driven the vehicle to its position in the parking lot, from which it could easily be moved, and immediately returned to his truck upon learning that there were no vacancies at the motel.[5]

Whether defendant was asleep with his head on the steering wheel or stretched out on the seat, he would still be capable of driving off as soon as he awakened. Further, if he had prior control and was responsible for the car being in its present position, especially if the keys were still in the ignition and the headlights were on, he is ready to go, and the potential for tragedy is present. It is this circumstance that the legislature specifically wanted to prevent when it enacted laws prohibiting a driver from being in actual physical control of a vehicle while intoxicated. The legislative intent behind drunk driving laws is to protect the public by apprehending intoxicated drivers before they kill or maim someone. This professed public policy deserves more than mere lip service. To focus exclusively upon the fact that the driver was not sitting in the driver's seat or that he was asleep and to ignore other relevant factors, as defendant would have us do, is illogical. Thus, we conclude, under a totality of the circumstances, that defendant was in actual, physical control of the vehicle.

Defendant makes a compelling argument that intoxicated drivers should be encouraged to pull off to the side of the road to sleep it off.[6] This approach is more appropriately the province of the legislature. *See Fieselman*, 537 So.2d at 606. If the legislature deems it desirable to encourage drinking drivers to pull off the road and refrain from driving while intoxicated, it could delete the words "or be in physical control of" to accomplish that purpose.

We affirm defendant's conviction.

BENCH and LARSON, JJ., concur.

5. Defendant's counsel proffered:
Mr. Walker, in his testimony, would state that he approached the motel. He met a guest at that hotel leaving say, "It's full, you cannot go in. It's occupied." So Mr. Walker at that time turned around and went to his truck, put the pillow on the bench of the truck seat, laid down and went to sleep.

6. In *State v. Peterson*, 769 P.2d 1221, 1224 (Mont.1989), the Montana Supreme Court rejected this argument, stating, "The better policy is that a person should ascertain his ability to drive *before* climbing behind the wheel and terrorizing the roadways of this state."

den. In that case, however, the trial court dismissed the robbery charge on its own volition. That is not the case here.

The District Attorney's office, an arm of the state, and under the direct supervision of the Attorney General (67-5-1), that is appealing here,—a somewhat unorthodox and inconsistent circumstance,—made the motion to dismiss the action, which at that point was as much an issue as Combs' restraint of liberty. It would seem that before this court orders the trial court to do much of anything the matter of that motion to dismiss and the resulting dismissal, all for a presumably good cause, should be resolved.

In addition to the position I take on the aspect of this case reflected in the paragraph immediately above, I urge that perhaps we made a mistake in the remand portion of the McGuffey case and that we should overrule that part of it. The instant case itself seems to point up the advisability of so doing. To do anything more could lead us on safari in a civil proceeding down a road into an erstwhile juristic jungle of no return.

25 Utah 2d 404

STATE of Utah, Plaintiff and Respondent,

v.

Charles BUGGER, Defendant and Appellant.

No. 12278.

Supreme Court of Utah.

April 6, 1971.

Defendant was convicted in the Second District Court, Davis County, Thornley K. Swan, J., of being in actual physical control of his vehicle while under influence of intoxicating liquor, and he appealed. The Supreme Court, Tuckett, J., held that defendant who was asleep in his automobile which was completely off traveled portion of highway and whose motor was not running at time investigating officer awakened defendant and detected smell of alcohol was not in "actual physical control of any vehicle" in violation of statute proscribing such behavior at time of his arrest.

Reversed.

Ellett, J., dissented and filed opinion.

Automobiles ⇐332

Defendant who was asleep in his automobile which was completely off traveled portion of highway and whose motor was not running at time investigating officer awakened defendant and detected smell of alcohol was not in "actual physical control of any vehicle" in violation of statute proscribing such behavior at time of his arrest. U.C.A.1953, 41-6-44.

See publication Words and Phrases for other judicial constructions and definitions.

Robert Van Sciver, Van Sciver, Florence, Hutchison & Sharp, Salt Lake City, for defendant-appellant.

Vernon B. Romney, Atty. Gen., Lauren N. Beasley, Asst. Atty. Gen., Salt Lake City, for plaintiff-respondent.

TUCKETT, Justice:

The defendant was found guilty of a violation of Section 41-6-44, U.C.A.1953, and from that conviction he has appealed to this court.

During the night of July 28, 1969, the defendant was asleep in his automobile which was parked upon the shoulder of a road known as Tippet's Lane in Davis County. The automobile was completely off the traveled portion of the highway and the motor was not running. An officer of the Highway Patrol stopped at the scene and discovered the defendant was asleep. With some effort the officer succeeded in awakening the defendant, at which time the officer detected the smell of alcohol and

arrested the defendant for being in actual physical control of the vehicle while under the influence of intoxicating liquor.

The complaint charges the defendant with the violation of the statute above referred to which provides as follows:

> It is unlawful and punishable as provided in subsection (d) of this section for any person who is under the influence of intoxicating liquor to drive or be in actual physical control of any vehicle within this state.

The defendant is here challenging the validity of the statute on the grounds of vagueness. However, we need not decide the case upon that ground. That part of the statute which states: "be in actual physical control of any vehicle" has been before the courts of other jurisdictions which have statutes with similar wordings. The word "actual" has been defined as meaning "existing in act or reality; * * * in action or existence at the time being; present; * * *." The word "physical" is defined as "bodily," and "control" is defined as "to exercise restraining or directing influence over; to dominate; regulate; hence, to hold from actions; to curb." The term in "actual physical control" in its ordinary sense means "existing" or "present bodily restraint, directing influence, domination or regulation."[1] It is clear that in the record before us the facts do not bring the case within the wording of the statute. The defendant at the time of his arrest was *not* controlling the vehicle, nor was he exercising any dominion over it. It is noted that the cases cited by the plaintiff in support of its position in this matter deal with entirely different fact situations, such as the case where the driver was seated in his vehicle on the traveled portion of the highway; or where the motor of the vehicle was operating; or where the driver was attempting to steer the automobile while it was in motion; or where he was attempting to brake the vehicle to arrest its motion.

We are of the opinion that the facts in this case do not make out a violation of the statute and the defendant's conviction is reversed. We do not consider it necessary to discuss the other claimed errors raised by the defendant.

CALLISTER, C. J., and HENRIOD and CROCKETT, JJ., concur.

ELLETT, Justice (dissenting).

I dissent.

The statute formerly made it unlawful for a person under the influence of intoxicating liquor to drive any vehicle upon any highway within this state.[1] The amendment added a provision making it unlawful to be in actual physical control of a vehicle while under the influence of intoxicating liquor. It removed the need to be upon a highway before the crime was made out and did away with the necessity of driving before a crime was committed.

The reason for the change is obvious. It is better to prevent an intoxicated person in charge of an automobile from getting on the highway than it is to punish him after he gets on it. The amended statute gives officers a right to arrest a drunk person in the control of an automobile and thus prevent him from wreaking havoc a minute later by getting in traffic, or from injuring himself by his erratic driving.

It does not matter whether the motor is running or is idle nor whether the drunk is in the front seat or in the back seat. His potentiality for harm is lessened but not obviated by a silent motor or a back-seat position—provided, of course, that he is the one in control of the car. It only takes a flick of the wrist to start the motor or to engage the gears, and it requires only a moment of time to get under the wheel from the back seat. A drunk in control

1. State v. Webb, 78 Ariz. 8, 274 P.2d 338; State v. Ruona, 133 Mont. 243, 321 P.2d 615; Ohio v. Wilgus, Com.Pl., 17 Ohio Supp. 34; Parker v. State (Okl. Cr.App.), 424 P.2d 997; 47 A.L.R.2d 582.

1. Sec. 57-7-14, R.S.U.1933.

of a motor vehicle has such a propensity to cause harm that the statute intended to make it criminal for him to be in a position to do so.

Restraining the movement of a vehicle is controlling it as much as moving it is. A person finding a drunk in the back seat of a car parked in one's driveway is likely to learn who is in control of that car if he should attempt to move it. A drunk may maliciously block one's exit, and in doing so he is in control of his own vehicle.

I think the defendant in this case was in control of his truck within the meaning of the statute even though he may have been asleep. He had the key and was the only one who could drive it. The fact that he chose to park it is no reason to say he was not in control thereof.

I, therefore, think that we should consider the question which he raises in his brief as to the validity of the statute.

Cases wherein an attack was made on statutes like ours have been decided in a number of jurisdictions. They hold the statute good.

In the case of State v. Webb, 78 Ariz. 8, 274 P.2d 338 (1954), the defendant was intoxicated and asleep in a truck parked next to some barricades in a lane of traffic. An officer passed by and observed no one in the car. Later he returned and found the defendant "passed out." The statute made it a crime to be in actual physical control of a car while under the influence of intoxicating liquor. The defendant contended that the wording of the statute was not meant to apply to a situation where the car was parked and that it was only concerned with the driving of an automobile and other acts and conduct of a positive nature. In holding that the statute was applicable to the conduct of the defendant, the court said:

> An intoxicated person seated behind the steering wheel of a motor vehicle is a threat to the safety and welfare of the public. The danger is less than that involved when the vehicle is actually moving, but it does exist.

In the case of Parker v. State, 424 P.2d 997 (Okl.Cr.App.1967), the appellant challenged the constitutionality of a statute making it unlawful for "any person who is under the influence of intoxicating liquor to drive, operate, or be in actual physical control of any motor vehicle within this state." There the defendant (appellant) claimed that the statute was unconstitutional in that it was so vague and indefinite that a person charged thereunder would be deprived of due process of law. The court held that the statute did not violate any of appellant's constitutional rights.

Under a similar statute the Montana Supreme Court in State v. Ruona, 133 Mont. 243, 321 P.2d 615 (1958), held that the statute was not void for vagueness, and in doing so said:

> * * * Thus one could have "actual physical control" while merely parking or standing still so long as one was keeping the car in restraint or in position to regulate its movements. Preventing a car from moving is as much control and dominion as actually putting the car in motion on the highway. Could one exercise any more regulation over a thing, while bodily present, than prevention of movement or curbing movement. As long as one were physically or bodily able to assert dominion, in the sense of movement, then he has as much control over an object as he would if he were actually driving the vehicle.
>
> * * * * * *
>
> * * * [I]t is quite evident that the statute in the instant case is neither vague nor uncertain. * * *

The appellant here claims some federally protected rights in that he says he was improperly arrested. It is difficult for me to see where that has anything to do with guilt or innocence. If he were improperly arrested, he would have an action against the officer for false arrest, but surely our courts have not lost contact with reality to the extent that we turn a guilty man free simply "because the constable may have blundered."

From what has been said above, there is absolutely no merit to this claim. By being in control of an automobile while under the influence of intoxicating liquor, the defendant was guilty of a misdemeanor which was in the presence of the officer, and the officer had a right and a duty to arrest him.[2]

The defendant was found guilty in the court below of being in actual physical control of his truck while he was under the influence of intoxicating liquor. He does not dispute that he was drunk. If the statute is good, we should not attempt to overrule the trier of the facts and find that the defendant was not the one actually controlling his truck.

I would affirm the judgment of the trial court.

25 Utah 2d 408

Irene A. PETERSON, Plaintiff and Respondent,

v.

CONTINENTAL CASUALTY COMPANY, a corporation, Defendant and Appellant.

No. 12187.

Supreme Court of Utah.

March 29, 1971.

Appeal by insurer from judgment of the Sixth District Court, Sevier County, Ferdinand Erickson, J., holding that deceased was covered by accident policy. The Supreme Court, Henriod, J., held that where farmer was working about idling farm tractor located on his private property and it rolled forward and crushed him, he was "pedestrian" within policy covering injury "sustained in consequence of being struck by any land conveyance while a pedestrian."

Affirmed.

Ellett, J., dissented and filed opinion.

1. Insurance ⇐452

Person on foot does not cease to be "pedestrian" within policy covering injuries sustained while a pedestrian merely because he is not in motion.

See publication Words and Phrases for other judicial constructions and definitions.

2. Insurance ⇐452

Where farmer was working about idling farm tractor located on his private property and it rolled forward and crushed him, he was "pedestrian" within policy covering injury "sustained in consequence of being struck by any land conveyance while a pedestrian."

Thomas S. Taylor, of Christensen, Taylor & Moody, Provo, for defendant-appellant.

Tex R. Olsen, of Olsen & Chamberlain, Richfield, for plaintiff-respondent.

HENRIOD, Justice:

Appeal from what was labeled a summary judgment for plaintiff which actually was a judgment on all available facts, under an insurance policy covering injury "sustained in consequence of being struck by any land conveyance *while a pedestrian*." Affirmed, with costs to plaintiff.

Believable evidence elicited under the discovery process indicates that plaintiff's farmer husband was crushed by a tractor that, driverless, had rolled down a rise, all of which occurred on his private property.

The only question is whether the deceased was a "pedestrian" under the terms of the policy. The trial court said he was, —a conclusion with which we agree,—no one questioning the fact that the tractor was a "land conveyance," and it appearing that the vehicle, out of gear, simply traveled downhill as mentioned, and quite obviously ran over the deceased.

[1, 2] Appellant indulges a non sequitur by assuming that coverage under the policy

2. Sec. 77-13-3(1), U.C.A.1953.

band in the amount of $16,265.66. The judgment rendered in favor of Vera's estate on the creditor's claim against Sergey's estate is affirmed.

We remand to the trial court for entry of judgment against Beverly Scott and her husband, in accordance with this opinion.

DURHAM and WARD WILLIAMS, JJ., concur.

36 Wash.App. 439

STATE of Washington, Respondent,

v.

Timothy J. SMELTER, Appellant.

No. 12793-4-I.

Court of Appeals of Washington, Division 1.

Jan. 11, 1984.

After the defendant was convicted in the district court of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor, the Superior Court, King County, Frank D. Howard, J., affirmed the judgment and sentence, and discretionary review was granted. The Court of Appeals, Corbett, J., held that defendant, who was found intoxicated behind the wheel of an automobile which was stopped, with its engine off and out of gas, partly on left shoulder of southbound lane of a major freeway, near several exits and gas stations, was in "actual physical control" of vehicle for purposes of statute making a person guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor if he has actual physical control of the vehicle and .10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance.

Affirmed.

1. Automobiles ⇐332

The term "actual physical control," within statute making a person guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if he has actual physical control of a vehicle and .10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance, focuses not upon the mechanical condition of the vehicle when it comes to rest, but upon the status of its occupant and the nature of the authority he exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move, and encompasses those situations where circumstantial evidence permits a legitimate inference that the vehicle was where it was and was performing as it was because of the individual's choice. West's RCWA 46.61.504.

See publication Words and Phrases for other judicial constructions and definitions.

2. Automobiles ⇐332

Defendant, who was found intoxicated behind the wheel of an automobile which was stopped, with its engine off and out of gas, partly on left shoulder of southbound lane of a major freeway, near several exits and gas stations, was in "actual physical control" of vehicle for purposes of statute making a person guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor if he has actual physical control of the vehicle and .10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance. West's RCWA 46.61.504.

Powe, Hough, Bingham & Allen, Thomas W. Bingham, Seattle, for appellant.

Norman K. Maleng, King County Pros. Atty., Scott McKay, Nicole MacInnes, Deputy Pros. Attys., Thornton Hatter, Senior Intern, Seattle, for respondent.

CORBETT, Judge.

Defendant, Timothy J. Smelter, appeals his judgment and sentence for being in actual physical control of a motor vehicle while under the influence of intoxicating liquor. We affirm.

A Washington State Patrol trooper observed the defendant seated behind the wheel of an automobile which was stopped, with its engine off, partly on the left shoulder of southbound Interstate 5. The vehicle was out of gas. Based upon the officer's observations, the defendant was arrested and a breathalyzer test administered. At trial, the defendant stipulated that he had alcohol in his blood exceeding .10 percent by weight. The district court judge found that the defendant's automobile was reasonably capable of being operated and found the defendant guilty. The matter was heard by the superior court and the judgment and sentence affirmed. Discretionary review has been granted to determine whether a motor vehicle must be "operable" in order for an individual to be found guilty of violating RCW 46.61.504. The statute in pertinent part provides:

> A person is guilty of being in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug if he has actual physical control of a vehicle within this state while:
>
> (1) He has a 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance made under RCW 46.61.506, as now or hereafter amended;
>
> ....

RCW 46.61.504.

Defendant argues that actual movement of the vehicle is not an element of the offense, *McGuire v. Seattle,* 31 Wash.App. 438, 442, 642 P.2d 765 (1982), but that the *ability* to move or operate the vehicle is. He contends that he was unable to move his vehicle because it was out of gas, and thus he was not in actual physical control of it.

There are essentially three types of statutes dealing with intoxicated persons and motor vehicles: those which prohibit "driving" while intoxicated, those which prohibit "operating" a motor vehicle while intoxicated, and those which forbid an intoxicated person to be in "actual physical control" of a motor vehicle. *Jacobson v. State,* 551 P.2d 935, 937 (Alaska 1976). Washington prohibits driving while under the influence, RCW 46.61.502, and being in actual physical control while under the influence. RCW 46.61.504. An "operator or driver" is defined as one "who drives or is in actual physical control of a vehicle," RCW 46.04.370, the disjunctive formulation suggesting that two different types of activity are contemplated.

While the verb "drive" is nowhere defined in the Washington Motor Vehicle Code, driving is the most restrictive of the three categories of activities, *see State v. Purcell,* 336 A.2d 223, 225 (Del.Super.1975), specifically requiring motion of the motor vehicle. *County of Milwaukee v. Proegler,* 95 Wis.2d 614, 291 N.W.2d 608, 613 (Wis.App.1980). Generally, "to operate" includes a larger class of activities than "to drive"; one who drives a motor vehicle necessarily operates it, but the reverse is not necessarily so. *Jacobson v. State, supra* at 937.

While courts interpreting drunk *driving* statutes occasionally speak in terms of "operating a motor vehicle," *People v. Hoffman,* 53 Misc.2d 1010, 280 N.Y.S.2d 169, 170 (Dist.Ct. Nassau County 1967), it has been stated with frequency that "operating a vehicle" and "being in actual physical control" define two distinct offenses. *Cincinnati v. Kelley,* 47 Ohio St.2d 94, 351 N.E.2d 85, 86 (Ohio 1976), *cert. denied,* 429 U.S. 1104, 97 S.Ct. 1131, 51 L.Ed.2d 554 (1977); *State v. Wilgus,* 31 Ohio Op. 443 (Ct.Com.Pl. 1945), *cited in State v. Ruona,* 133 Mont. 243, 321 P.2d 615, 618 (1958); *Crane v. Oklahoma,* 461 P.2d 986, 988 (Okla.Cr.1969).

No Washington case or statute defines "actual physical control" as the term is used in RCW 46.61.504. The question of actual physical control is, according to WPIC 92.11, Comment, "an issue of law or at best a mixed issue of law and fact," and the dictionary definition of the words "actual," "physical," and "control" may be used. The

formulation of the dictionary definition employed by the Supreme Court of Montana has been widely adopted: "Using the term in 'actual physical control' in its composite sense, it means 'existing' or 'present bodily restraint, directing influence, domination or regulation.'" *State v. Ruona, supra,* 321 P.2d at 618. *Accord, Kansas City v. Troutner,* 544 S.W.2d 295, 300 (Mo.App.1976); *State v. Ghylin,* 250 N.W.2d 252, 254 (N.D. 1977); *Hughes v. State,* 535 P.2d 1023, 1024 (Okl.Cr.1975); *Commonwealth v. Kloch,* 230 Pa.Super. 563, 327 A.2d 375, 383 (1974); *State v. Bugger,* 25 Utah 2d 404, 483 P.2d 442, 443 (1971).

Defendant claims that a vehicle operability requirement is "clear" from a reading of *State v. Ruona, supra,* 321 P.2d at 618:

> As long as one were physically or bodily able to assert dominion, in the sense of movement, then he has as much control over an object as he would if he were actually driving the vehicle.

However, the *Ruona* court, in distinguishing the offenses of "operating" and "being in actual physical control" of a motor vehicle, cited with approval a definition of "control" that meant more than the "'ability to stop an automobile,'" and included "'the authority to manage.'" *State v. Ruona, supra* 321 P.2d at 618, *quoting State v. Wilgus, supra.* Actual physical control has elsewhere been broadly defined as "'exclusive physical power and present ability to operate, move, park or direct whatever use or non-use was to be made of the motor vehicle at the moment.'" *State v. Purcell, supra* at 226. Motion of the vehicle is not an element of actual physical control. *McGuire v. Seattle, supra* 31 Wash.App. at 442, 642 P.2d 765. *Accord, State v. Webb,* 78 Ariz. 8, 274 P.2d 338, 340 (1954); *Kansas City v. Troutner, supra* at 299; *Commonwealth v. Taylor,* 237 Pa.Super. 212, 352 A.2d 137, 139 (1975). Several courts have found defendants to be in actual physical control of vehicles whose motors were not running. *E.g., State v. Ghylin, supra* at 253 (getting out of car in ditch, keys in hand); *State v. Schuler,* 243 N.W.2d 367, 369–70 (N.D.1976) (seated in driver's seat of car in ditch, keys in ignition); *Cincinnati v. Kelley, supra* 351 N.E.2d at 86 (seated in driver's seat of parked car, keys in ignition).

Only three cases have been brought to our attention in which the court found no actual physical control of a motionless vehicle whose motor was not running, and none is of aid to the defendant here. In *State v. Bugger, supra* 483 P.2d at 442–43, the court, applying the *Ruona* definition, found that a defendant who was asleep in a car parked completely off the traveled portion of the highway was not in actual physical control. The same result would obtain under RCW 46.61.504, which specifically prohibits conviction of a defendant who has moved his vehicle safely off the roadway. In *Bearden v. State,* 430 P.2d 844, 845–47 (Okl.Cr.1967), the court found no actual physical control where the defendant was found lying unconscious at the side of the road, *outside* his vehicle. Positioning in the driver's seat is an element common to all of the cases that have found actual physical control of a motionless vehicle, and that is the position in which the defendant here was found. The court in *Key v. Town of Kinsey,* 424 So.2d 701, 703–04 (Ala.Cr.App.1982), formulated the following list of elements of actual physical control:

> 1. Active or constructive possession of the vehicle's ignition key by the person charged or, in the alternative, proof that such a key is not required for the vehicle's operation;
>
> 2. Position of the person charged in the driver's seat, behind the steering wheel, and in such condition that, except for the intoxication, he or she is physically capable of starting the engine and causing the vehicle to move;
>
> 3. A vehicle that is operable to some extent.

The defendant in *Key* did not meet these criteria because the car was out of gas, and his son, who had the car keys, had walked to get gas. There was also evidence that the son, and not the defendant, was the driver. Although the opinion is not entirely clear, it appears that the court was relying more on the absence of the ignition keys, on

the issue of present ability to control the car, than upon the car being out of gas, in determining that there was no actual physical control by the defendant. *Key, supra* at 704. The cryptic reference to operability was not explained, but it would appear to be compatible with the "reasonably capable of being rendered operable" standard employed by the trial judge in the instant case.

A definition of "control" that focuses upon "the authority to manage" a motor vehicle, perhaps as evidenced by lawful possession of the keys while seated in the driver's seat, would permit a finding of actual physical control of an inoperable vehicle. The question of what constitutes the elements of actual physical control, such as whether the motor must be running or, by extension, whether the vehicle must be operable, has been characterized as a policy issue. *State v. Juncewski,* 308 N.W.2d 316, 320 (Minn.1981). In general, laws prohibiting driving while intoxicated are deemed remedial statutes, to be "liberally interpreted in favor of the public interest and against the private interests of the drivers involved." *Id.* at 319. Specifically, actual physical control statutes have been characterized as "preventive measure[s]," *State v. Schuler, supra* at 370, which "deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers," *State v. Ghylin, supra* at 255, and which "enable the drunken driver to be apprehended before he strikes." *State v. Webb, supra* 274 P.2d at 339.

[1, 2] The "reasonably capable of being rendered operable" standard employed by the trial court here distinguishes a car that runs out of gas on a major freeway near several exits and gas stations from a car with a cracked block which renders it "totally inoperable." The difficulty in attempting to formulate a unitary standard of operability arises from the necessity of setting out the *degree* of inoperability which will preclude prosecution under RCW 46.61.504. The focus should not be narrowly upon the mechanical condition of the car when it comes to rest, but upon the status of its occupant and the nature of the authority he or she exerted over the vehicle in arriving at the place from which, by virtue of its inoperability, it can no longer move. Where, as here, circumstantial evidence permits a legitimate inference that the car was where it was and was performing as it was because of the defendant's choice, it follows that the defendant was in actual physical control. To hold otherwise could conceivably allow an intoxicated driver whose vehicle was rendered inoperable in a collision to escape prosecution. Such a result was avoided in *Commonwealth v. Taylor, supra* 352 A.2d at 140, in which the defendant's actual driving ended in a collision that sent his vehicle off the highway. He was seated on the driver's side after the crash, and the court noted that "it could be inferred that the car was where it was and the condition in which it was because of appellant's choice 'from which it followed that appellant was in "actual physical control" and so was "operating" the car....' This 'physical control' continued in the appellant after the collision had immobilized his car." *Id.*

In the instant case, extrinsic evidence that the defendant, while intoxicated, drove his vehicle until it ran out of gas, together with his *admission* of these facts, supports a finding that he was in actual physical control of his vehicle when apprehended. *See State v. Ghylin, supra* at 253–54 (fact that car was stuck in a ditch, coupled with defendant's admissions that he was driving and other evidence, found to be sufficient evidence of actual physical control). Such an analysis finds support in the latest statement on the subject by the Supreme Court of Montana, whose definition of actual physical control in *State v. Ruona, supra* 321 P.2d at 618, has been widely adopted. In a case in which the defendant was found asleep behind the wheel of a motor vehicle which was stuck in a pit, the court applied the same analysis as employed in cases where a defendant is found asleep or passed out behind the wheel of a movable vehicle. Actual physical control is found in those cases on the theory that the defendant is in a position to regulate the vehicle's movements, *or* has authority to manage the vehicle:

> Just as a motorist remains in a position to regulate a vehicle while asleep behind its steering wheel, so does he remain in a position to regulate a vehicle while asleep behind the steering wheel of a vehicle stuck in a borrow pit. He has not relinquished regulation of or control over the vehicle. *It does not matter that the vehicle is incapable of moving.*

State v. Taylor, 661 P.2d 33, 34 (Mont.1983) (emphasis added).

Clearly, based on the circumstances of the defendant's apprehension and his own admissions, the trial court did not err in finding that the vehicle was reasonably capable of being operated or rendered operable and, therefore, that the defendant was in actual physical control of the vehicle.

Affirmed.

ANDERSEN, C.J., and DURHAM, J., concur.

36 Wash.App. 451

STATE of Washington, Respondent,

v.

Robert Bryan PORTER, Appellant,

and

Richard Scott Buntain, and each of them, Defendant.

No. 12087-5-I.

Court of Appeals of Washington, Division 1.

Jan. 16, 1984.

Rehearing Denied March 7, 1984.

Defendant was convicted in the Superior Court, King County, George Revelle, J., of first-degree arson, and he appealed. The Court of Appeals, Scholfield, J., held that the trial court did not err in declining to rule on defendant's motion in limine to exclude a prior conviction before the State had rested its case in chief and, though defendant was entitled to a ruling before he took the stand, he waived his right to a timely ruling when he proceeded to testify about his prior conviction on direct examination without renewing his motion, thus precluding the trial court from ruling on the motion at a time when the refusal to rule would have been error.

Affirmed.

1. Criminal Law ⇨632(4)

A motion in limine is the proper procedure to obtain an early ruling on the admissibility of prior convictions and, though an early ruling is helpful to both parties and avoids interruption on proceedings before the jury, there is no requirement that the trial court make such a ruling before the defendant takes the witness stand.

2. Criminal Law ⇨632(4)

It is reasonable and proper for a trial court to defer its ruling on a motion in limine to exclude prior convictions until it knows enough about the case to be able to make an intelligent decision.

3. Criminal Law ⇨706(5)

Until the trial court has ruled on a motion in limine to exclude prior convictions, any question relating to those convictions should not be asked in the presence of the jury.

4. Criminal Law ⇨632(4)

The trial court did not err in declining to rule on defendant's motion in limine to exclude a prior conviction before the State had rested its case in chief and, though defendant was entitled to a ruling before he took the stand, he waived his right to a timely ruling when he proceeded to testify about his prior conviction on direct examination without renewing his motion, thus precluding the trial court from ruling on the motion at a time when the refusal to rule would have been error.

5. Criminal Law ⇨632(4)

A trial court should not defer ruling on a timely motion in limine to exclude prior